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Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PAUL E. NUNU and SHANDA NUNU,
Petitioners

v.

THE DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION,
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDICES 1 & 2

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ATTORNEYS FOR PETITIONERS

31 pp

QUESTIONS PRESENTED

(1) Are findings of fact made by a Bankruptcy Court in a Judgment and Memorandum concluding a contested 11 U.S.C. §362(d) Motion to Lift Stay proceeding final for Res Judicata and Collateral Estoppel purposes after the expiration of time for appeal under Bankruptcy Rule 8002(a), or, are they *"preliminary"* and subject to being *"revised"* in a subsequent proceeding between the same parties?

(2) If such findings of fact are contained in a judgment which is final, does a subsequent judgment in a separate proceeding in the same court, involving the same parties, holding contrary to such original findings and thereby denying Petitioners their residential homestead exemption, violate the Res Judicata and Collateral Estoppel rights of Petitioners.

(3) Did the Court of Appeals and the District Court err in allowing a "judicial lien" to encumber Petitioners' residential homestead in violation of 11 U.S.C. 522(f)1?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.[1]

Petitioners:	Paul E. Nunu Shanda Nunu
Attorney For Petitioners:	L. T. "Butch" Bradt
Respondent:	The Del Lago Estates Property Owners Association [2]
Attorneys For Respondent:	Boris A. Hidalgo, Esq. Diana M. Woodman Brown, Parker & Leahy, L.L.P.

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[1] David J. Askanase, Debtors' Chapter 7 Trustee abandoned his interest in the Del Lago property by written instrument dated October 26, 2000.

[2] The Del Lago Estates subdivision is composed of 90 lots in Montgomery County, Texas, the ownership of which changes fequently, and the current identities of such owners is unknown to Petitioners. However, only the Association is a party to this litigation.

ABBREVIATIONS USED IN THIS PETITION

Paul E. Nunu	("Paul""Debtor" Or "Petitioner")
Shanda Nunu	("Shanda" Or "Petitioner")
The Del Lago Estates Property Owners Association	("POA" Or "Respondent")

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Appendix 2	Fifth Circuit Court of Appeals Memorandum Opinion dated April 23, 2001;
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Appendix 3	District Court Memorandum and Order dated October 2, 2000 Denying Motion For Rehearing.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

PAUL E. NUNU and SHANDA NUNU,
Petitioners,

v.

THE DEL LAGO PROPERTY OWNERS ASSOCIATION,
Respondent.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDICES 1 & 2

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners, Paul E. Nunu and Shanda Nunu respectfully pray that a Writ Of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit affirming the District and Bankruptcy Court's denial of Petitioners' residential homestead exemption in a Chapter 7 proceeding.

REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished, and appears at Appendix 2. The Order denying rehearing also appears at Appendix 2. The opinion of the United States District Court is unpublished and appears at Appendix 4. The order of the United States District Court denying rehearing appears at Appendix 3. The Memorandum opinion of the Bankruptcy Court is unpublished and appears at Appendix 6. The order of the Bankruptcy Court denying rehearing appears at Appendix 5.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided this case was April 23, 2001. A timely filed petition for rehearing en banc was denied on May 21, 2001 (Appendix 2).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following statutes are directly involved in this Petition: 11 U.S.C. § 101(36); 11 U.S.C. § 362(d); 11 U.S.C. § 522(f)(1); Fed. R. Bankr. P. 8002(a); Fed. R. Bankr. P. 9021 and Amendment V, United States Constitution. (Appendix 8)

STATEMENT OF THE CASE

This is an appeal from a final judgment in an adversary proceeding ancillary to a Chapter 7 bankruptcy proceeding. The adversary proceeding followed a contested 11 U.S.C. §362(d) Motion to Lift Stay proceeding between the same parties. In the adversary proceeding the Bankruptcy Court revised its original finding made in the §362 proceeding that Petitioners were ***"living there"*** to mean ***"living on weekends and fishing trips"***, after the 10-day period for appeal under Bankruptcy Rule 8002(a) had expired. This revision became the basis used to deny Petitioners their homestead exemption. Petitioners appeal the denial of their residential homestead exemption and denial of their motion to avoid Respondent's judicial liens under 11 U.S.C. § 522(f)(1).

At issue is whether a non-appealed § 362 Memorandum and Judgment concluding a contested hearing is a final judgment entitled to full res judicata and collateral estoppel effect in subsequent litigation between the same parties, or whether the findings of fact and conclusions of law contained in the §362 Memorandum are ***"preliminary"*** and subject to being revised in subsequent litigation between the same parties. By allowing the § 362 Memorandum's findings of fact and conclusions of law to be considered ***"preliminary"*** and ***"revised"***, the Courts below violated Petitioners' Res Judicata/Collateral Estoppel rights under the Fifth Amendment, and impermissibly denied Petitioners their state constitutional right to a residential homestead exemption. This denial adversely impacted Debtor's right to discharge Respondent's judicial liens under 11 U.S.C. § 522(f)(1).

REASONS FOR GRANTING THE WRIT

This case presents important questions of Federal Bankruptcy law and the finality of Bankruptcy Court judgments not previously reviewed by this Court. It also involves important Fifth Amendment questions relating to res judicata and collateral estoppel. The decisions of the Bankruptcy Court, the District Court and the Court of Appeals impermissibly converted a final judgment into an interlocutory order, in direct contravention of Fed. R. Bankr. P. 8002(a) and prior decisions of the Fifth Circuit. These decisions implicate not only the proper application of the Bankruptcy Rules, but the overall administration of the Bankruptcy Act, and specifically the res judicata and collateral estoppel rights of Petitioners. The decision of the Court of Appeals denies Petitioners the constitutional right to a residential homestead exemption, a right expressly granted under the Texas Constitution and recognized by this Honorable Court. [3]

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[3] Petitioners homestead interest is a "property" interest recognized by this Court in *United States v. Rodgers*, 461 U.S. 677, 688 (1983): "Under Texas Homestead laws, a spouse has a vested estate in the land of which she cannot be divested during her life except by abandonment or voluntary conveyance in the manner prescribed by law."

SUMMARY OF THE ARGUMENT

The judgment of the Bankruptcy Court in the contested §362 Motion to Lift Stay proceeding, was a judgment governed by Fed. R. Bankr. P. 8002(a), and if not appealed within ten (10) days, its findings of fact and conclusions of law became final, subject to the principles of res judicata and collateral estoppel, as between the same parties. As a matter of law those findings were not subject to being revised in subsequent litigation between the same parties and, as revised, used to deny Petitioners their homestead rights.

The Court of Appeal's failure to apply the findings of fact contained in the contested §362 Memorandum and Judgment directly conflicts with *Myers v. International Trust Co.,* 263 U.S. 64 (1923) and *Ashe v. Swinson*, 397 U.S. 436 (1970). As a matter of federal law and judicial economy, the principles of res judicata and collateral estoppel should apply to the findings of fact contained in the contested §362 Memorandum and Judgment and those findings should be given full force and effect between the same parties.

MOTION TO LIFT STAY

Respondent filed a § 362(d) Motion to Lift Stay so that it could proceed against Petitioners' property in State Court. After a contested hearing in the § 362 proceeding, the Bankruptcy Court entered its § 362 Memorandum and Judgment on July 8, 1999, (Appendix 1) finding: ***"On September 10, 1986, approximately 13 years prior to the commencement of the instant Chapter 7 case, Paul acquired a parcel of property located in the lakefront community of Del Lago, approximately 30 miles north- northwest of downtown Houston, Texas."*** (Appendix 1, page 2a). ***"On March 3, 1989, the Debtor moved a mobile home onto the property and began living there with his wife";*** (Appendix 1, page 3a).

The Bankruptcy Court also found that ***"On March 6, 1989, the POA*** (Respondent) ***filed suit".*** (Appendix 1, page 3a). That suit was brought by Respondent only against Paul Nunu and resulted in a consent judgment being entered on July 23, 1990, imposing Respondent's 1988 Covenants upon the property and

permanently enjoining Paul to comply with those restrictive covenants. (Appendix 7, page 50a).

ENFORCEMENT OF STATE JUDGMENT

Through contempt proceedings enforcing the consent judgment of July 23, 1990, (Appendix 7, page 46a) Respondent forced the removal of Petitioners' mobile home as well as the destruction of all improvements Petitioners put upon the Del Lago property. (Appendix 7, page 48a) The Bankruptcy Court recognized in the §362 Memorandum that Petitioners ***"would be living in a mobile home on the property but for the POA's having obtained injunctive relief requiring him to remove the mobile home."*** (Appendix 1, page 5a).

The state court order of contempt dated August 14, 1995 (Appendix 7, page 48a)) enforcing the consent judgment of July 23, 1990, found Paul guilty of contempt for ***"violating the judgment ... by placing a trailer/mobile home upon the property for use as a residential dwelling by Nunu and his spouse, a non-party".*** (Appendix 7, page 48a). The state court's finding in the judgment of contempt was also entitled to full res judicata effect because it is a final judgment and the same parties were litigants.

RES JUDICATA/COLLATERAL ESTOPPEL CONTROLS

Res judicata and collateral estoppel are doctrines that are embodied in the Double Jeopardy clause of the Fifth Amendment. *Ashe v. Swinson*, 397 U.S. 436, 445. (1970). A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order. *Budinich v. Becton Dickerson,* 486 U.S. 196, 199 (1988).

The §362 Motion to Lift Stay proceeding was a contested matter under the Federal R. Bankr. P. 9014, and was a full, adversarial proceeding. The Bankruptcy Court sitting as the trier of fact resolved the factual disputes of the parties after both sides adduced evidence. Federal R. Bankr. P. 9021, required the

Bankruptcy Court to enter a separate judgment in the contested proceeding, which it did. Federal R. Bankr. P. 8002(a) required any party who was dissatisfied with the findings of fact contained in the judgment to file notice of appeal within 10 days. This was not done by any party. Because the §362 Memorandum was not appealed, as a matter of law it became a final judgment, with its findings of fact entitled to full res judicata and collateral estoppel effect between the parties to the proceeding. To hold otherwise licenses unnecessary bankruptcy litigation and frustrates the stated purpose of F.R.C.P. 1, that the Federal Rules are to be administered "*to secure the just, speedy, and inexpensive determination of every claim.*" (Emphasis supplied)

The Court of Appeals and the District Court erred by allowing the Bankruptcy Court in the adversary proceeding to revise its prior findings of fact and conclusions of law. In affirming the District Court, the Court of Appeals held that the finding that Petitioners were ***"living there"*** was ***"preliminary"*** and not binding as res judicata or the law of the case. The Court of Appeals stated that, ***"we agree with the District Court that the Bankruptcy Court was entitled to revise its preliminary findings following an abbreviated hearing on a motion and that the preliminary finding is not binding as the law of the case."*** (Emphasis supplied) (Appendix 2, page 9a) This holding converts a final judgment into an interlocutory order by allowing a collateral attack upon a final judgment of the Bankruptcy Court. This ruling directly conflicts with Fed. R. Bankr. P. 8002(a) as interpreted by numerous published decisions of the Fifth Circuit: *In Re Stangel*, 219 F.3d 498, 500 (5th Cir. 2000), "Fed. R. Bankr. P. 8002(a) allows the Debtor ten days from the date of a Rule 59-type motion in which to file his notice of appeal.", *In Re Macias*, 168 F.3d 209, at 211(5th Cir. 1999), "Failure to timely file notice of appeal deprives the district court of jurisdiction to consider the appeal." See also *In Re Dibert*, 117 F.3d 160 (5th Cir. 1997) (FN 53), *In Re Moody*, 41 F.3d 1024,(5th Cir. 1995), and *In Re Christopher*, 35 F.3d 232 (5th Cir. 1994). All other Circuits agree that bankruptcy orders must be appealed within 10 days or they are final.

By failing to accord the § 362 Memorandum and Judgment as a final order with full res judicata and collateral estoppel effect, the Courts below, on one hand, have treated the §362

Memorandum as a final judgment by allowing Respondent to proceed in state court to have its money judgment entered (Appendix 7, page 56a), while finding in this adversary proceeding that the judgment was not final, for purposes of the relevant findings of fact and conclusions of law. The Respondent should not be able to have it both ways, execute under the judgment in state court but re-litigate the adverse factual findings in Federal Court.

If the §362 Memorandum was a final judgment, entitled to full res judicata and collateral estoppel effect, then Petitioners had no burden to re-prove any finding of fact and conclusion of law contained in a final judgment between the same parties. Petitioners were severely prejudiced by a ruling revising the plain and unambiguous finding of ***"living there"***, because as a matter of federal law they were entitled to rely at trial in the adversary proceeding upon the prior findings contained in the § 362 Memorandum, as well as prior findings contained in the State Court's judgment of contempt dated August 14, 1995 because the same parties were involved. The State Court also found that Petitioners were ***"living there"*** when it found that Paul had placed ***"a trailer/mobile home upon the property for use as a residential dwelling by Nunu and his spouse"*** (Appendix 7, page 48a) (emphasis added). These findings were not applied by the Bankruptcy Court even though copies of these final judgments were introduced as evidence at trial in the adversary proceeding.

The failure of the Courts below to properly apply the law of res judicata merits correction by this Court. "*When an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit*". *Ashe v. Swinson*, 397 U.S. 436, 443 (1970). The opinion of the Court of Appeals directly conflicts with the law of res judicata as stated by this Honorable Supreme Court:

> "* * * For res judicata operates only to bar - - repetitious suits involving the same cause of action. [The bar] rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause

> of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' (citation omitted) The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever."

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 578-579 (1984). In *United States v. Moser*. 266 U.S. 236, 241 (1924) this Court said:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established....."

In *Myers v. International Trust Co.,* 263 U.S. 64 (1923) this Court decided:

> "An adjudication of bankruptcy, or a discharge therefrom, is a judgment in rem and is binding on, and res judicata as to, all the world, only in respect of the status of the bankrupt, and is not conclusive as to the findings of fact or subsidiary questions of law on which it is based *except as between parties to the proceedings or privies thereto."* [Emphasis supplied]

CONSTRUCTION OF JUDGMENTS

Petitioners acknowledge the principle that if the § 362 Memorandum had been ambiguous, then the Bankruptcy Court would have been entitled to construe that judgment in order to eliminate any ambiguity. However, no Court below has suggested that the §362 Memorandum was ambiguous.

That lack of ambiguity notwithstanding, the Bankruptcy Court revised its original finding that Petitioners were ***"living there"*** to mean ***"living on weekends and fishing trips."*** This violates the established principle of construction of judgments that if the language is plain and unambiguous, there is no room for construction; the effect thereof must be declared in the light of the literal meaning of the language used. The meaning and effect of the decree is to be ascertained, if possible, from its language, and the necessary legal implications therefrom. Here, *"living there"* should be given its plain and ordinary meaning.

The Fifth Circuit has repeatedly held that Texas homestead laws must be liberally construed to protect homestead exemptions. "The purpose of Texas homestead law is, and always has been, the protection of the homestead claimant, not the protection of lenders, judgment creditors or purchasers at foreclosure sales. Furthermore, the Texas courts have always given a liberal construction to the homestead provisions in the Texas Constitution and statutes to protect homestead rights." In Re Niland, 825 F.2d 801, 815 (5th Cir. 1987). "Because homesteads are favorites of the law, we must give must give a liberal construction to the constitutional and statutory provisions that protect homestead exemptions. ... Indeed we must uphold them and enforce Texas homestead laws even though in doing so we might unwittingly "assist a dishonest debtor in wrongfully defeating his creditors". *Bradley v. Pacific Southwest Bank, FSB*, 960 F.2d 502, 507 (5th Cir. 1992).

THE PROPERTY QUALIFIES AS HOMESTEAD

In the §362 proceeding, the Bankruptcy Court fully and fairly litigated the issue of whether Petitioners lived on the Del Lago property for the purposes of determining its status as residential homestead. The Courts below erred by denying Petitioners homestead exemption, which was established as a matter of law by the finding that ***"On March 3, 1989, the Debtor moved a mobile home onto the property and began living there with his wife".*** (Appendix 1, page 3a) (Emphasis supplied). The finding included all elements necessary to establish the homestead exemption as a matter of Texas law. ***"There is no rule of law better established in Texas than that possession and use of real estate by one who owns it, and***

who, with his family, resides upon it, makes it the homestead of the family in law and in fact". *Coury v. Prot*, 85 F.3d 244,254 (5th Cir. 1996). See also *England v. Federal Deposit Insurance Corporation*, 975 F.2d 1168, 1173(fn9) (5th Cir. 1992). *In Re Claflin*, 761 F.2d 1088, (5th Cir. 1985). *In Re Kennard*, 970 F.2d 1455 (5th Cir. 1992).

The finding of "living there" contained in the §362 Memorandum is factually specific and outcome determinative of Petitioners' homestead exemption. This finding unambiguously answers all questions about whether or not the Debtor and his family were living on the property and therefore entitled to the exemption. The fact that Petitioners were involuntarily evicted from the property by the state court and forced to remove their mobile home and improvements, does not change the initial residential homestead character of the property. In the case of *In Re Niland, supra*, at 807, the Fifth Circuit said:

> "It is not seriously disputed that Niland and his wife moved onto the property in 1971 with the intention of using the property as their home, and in fact so used it. We think that this evidence alone was sufficient to enable Niland to meet his burden of establishing the initial homestead character of the property."

Other reasons that the Del Lago property qualifies as Petitioners' exempt residential homestead are: 1) it was designated as exempt homestead on the bankruptcy schedules; 2) valuable improvements were made to the property; 3) Debtor filed a Designation of Homestead in July of 1988 in Montgomery County as required under Texas law (long before any claim of the Respondent accrued); (Appendix 7, page 45a) Petitioners swore under oath of their intent to use the property as their home.

NO VALID LIEN ON PROPERTY

In a Chapter 7 proceeding, under the principles of a "fresh start" a Debtor may avoid the fixing of a lien on exempt property under 11 U.S.C. § 522(f)(1), if: (1) that lien is a judicial lien; (2) that the lien is fixed against an interest of the Debtor in property; and (3) that the lien impairs an exemption to which the Debtor would otherwise be entitled. *In Re: Henderson*, 18F.3d 1305 (5th Cir. 1994). The basic purpose of the Bankruptcy Act is to give the debtor a new opportunity in life and a clear field for

future effort, unhampered by the pressure and discouragement of pre-existing debt. *Lines v. Frederick* 400 U.S. 18 (1970).

The Court of Appeals erred when it allowed Respondents' judicial liens as a valid lien against Petitioners' homestead. The consent judgment of July 23, 1990 and the money judgment for attorneys fees and civil damages dated September 30, 1999, are judicial liens as defined under 11 U.S.C. § 101(36) and are avoidable under 11 U.S.C.§ 522(f)(1) because they clearly impair Petitioner's Homestead. [4] (Appendix 7). The consent judgment of July 23, 1990 has been used to completely destroy Petitioners' residential use of the property . (Appendix 7, page s46a, 48a)

The judgments were entered years after Paul acquired the property on September 10, 1986. The Bankruptcy Court found that ***"On April 13, 1987, the Del Lago Estates Property Owners' Association ("POA") was incorporated. "On March 6, 1989, the POA*** (Respondent) ***filed suit"***.... after the homestead use of the property began on March 3, 1989. (Appendix 1, page 3a). Since the Del Lago property was Petitioners' homestead before the state court judgments were entered, the judicial liens should be avoidable under 11 U.S.C. § 522(f)(1). In *Farrey v. Sanderfoot*, 500 U.S. 291 (1991) this Court decided that a judicial lien can be avoided in a bankruptcy proceeding because it impairs an exemption if the Debtor owned an interest in the property before the lien affixed:

> "[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property...only when the lien attached to the debtor's interest at some point after debtor obtained the property... As before the critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he did... section 522(f)(1) does permit the debtor to avoid the fixing of the lien on that interest.

---

[4] Respondent is not a secured creditor with a pre-existing contractual lien. Rather, Respondent is a judgment creditor with a "consent judgment." A "consent judgment" that imposes an encumbrance against a homestead without the joinder of a spouse, is unenforceable under Texas homestead law. *Behrens v. Behrens*, 186 S.W.2d 697 (Tex. Civ. App. – Austin 1945, no writ); *In Re Daves*, 770 F.2d 1363 (5th Cir. 1985).

CONCLUSION

The Court of Appeals' decision to deny Petitioners' residential homestead exemption thwarts the established principles of res judicata and clear constitutional protection. If uncorrected, the decisions below will arbitrarily convert otherwise final judgments from § 362 proceedings (and state court contempt proceedings) into interlocutory judgments at tremendous expense to both the parties involved and the Federal Judiciary. The result does violence to the concepts of res judicata and collateral estoppel, concepts embodied within the Due Process protections of the Fifth Amendment.

"We have said elsewhere that [t]he considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." *Budinich v. Becton Dickerson* 486 U.S. 196, 201 (1988)

For the foregoing reasons, Petitioners move this Court for reversal of the Court of Appeals' decision denying Petitioners' Del Lago residential homestead exemption, denying res judicata / collateral estoppel effect to the § 362 Memorandum and Judgment, denying avoidance of the Respondent's judicial liens, and for such other and further relief that they may show themselves entitled.

The petition for a writ of certiorari should be granted. Petitioners should be granted general relief.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

APPENDIX 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE	)	
	)	
PAUL E. NUNU	)	CASE NO. 99-31474-H3-7
Debtor,	)	
	)	

JUDGMENT

Based on the separate Memorandum Opinion signed this same date, it is

ORDERED that the "Motion of Del Lago Estates Property Owners' Association for Relief from Stay" (Docket No. 12) is granted. It is further

ORDERED that the "Debtor's Response to Objection of Del Lago Estates Property Owners' Association to Exemptions of Debtor and Motion to Avoid Judicial Lien under 11 U.S.C. § 522(f) (1)' (Docket No. 16), and "Debtor's Objection to Motion for Relief from Stay and Motion to Disallow Claims" (Docket No. 15) are denied without prejudice to the filing of an adversary proceeding. It is further

ORDERED that the "Objection of Del Lago Estates Property Owners' Association to Exemptions of Debtor" (Docket No. 22) is abated pending further order of this court.

Signed at Houston, Texas on this 8th day of July 1999.

/s/ LETITIA Z .CLARK

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE	)	
PAUL E. NUNU,	)	CASE NO. 99-31474-H3-7
Debtor,	)	

MEMORANDUM OPINION

The following contested matters are pending: 1) "Motion of Del Lago Estates Property Owners' Association for Relief from Stay" (Docket No. 12) ; 2) "Objection of Del Lago Estates Property Owners' Association to Exemptions of Debtor" (Docket No. 22); "Debtor's Response to Objection of Del Lago Estates Property Owners' Association to Exemptions of Debtor and Motion to Avoid Judicial Lien under 11 U.S.C. 5 522(f) (1)" (Docket No. 16); and 4) "Debtor's Objection to Motion for Relief from Stay and Motion to Disallow Claims" (Docket No. 15) . The following are the Findings of Fact and Conclusions of Law of the court. A separate conforming Judgment will be entered. To the extent any of the Findings of Fact are considered Conclusions of Law, they are adopted as such. To the extent any of the Conclusions of Law are considered Findings of Fact, they are adopted as such.

Background

Paul E. Nunu ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code on February 11, 1999. David J. Askanase is the Chapter 7 Trustee.

On September 10, 1986, approximately 13 years prior to the commencement of the instant Chapter 7 case, Debtor acquired a parcel of property located in the lakefront community of Del Lago, approximately 30 miles north-northwest of downtown Houston, Texas. (Exhibit 3)

On October 2, 1982, prior to Debtor's acquisition of the property, the developers of Del Lago recorded restrictions and covenants in the real property records of Montgomery County, Texas. (Exhibit 2)

Debtor is an attorney. He testified that between September 10, 1986, when he acquired the property, as payment from a client involved in the development of Del Lago, and March 3, 1989, he had the property surveyed, had dirt added to the property to raise its level, and had the soil tested.

On April 13, 1987, the Del Lago Estates Property Owners' Association ("POA") was incorporated. (Exhibit 4). On January 12, 1988, the POA recorded amended restrictions and covenants. (Exhibit 5).

On March 3, 1989, Debtor moved a mobile home on to the property, and began living there with his wife. On March 6, 1989, the POA filed suit, in the 284th Judicial District Court of Montgomery County, Texas, seeking to require Debtor to remove the mobile home, on grounds the mobile home violated the 1982 and 1988 deed restrictions. (Exhibit 7) . Debtor asserted in that suit that neither the 1982 nor 1988 deed restrictions applied to his interest in the property. (Exhibit 8)

The state court severed the issue of whether the property was burdened with the deed restrictions, from damages and maintenance and other fees. The state court ruled that Debtor's Property was indeed burdened with the 1988 restrictions. (Exhibit 7) . The state court's judgment was affirmed by the Texas Court of Appeals. (Exhibit 8) . The Texas Supreme Court denied Debtor's application for writ of error. (Exhibit 9)

On October 17, 1995, after the denial of Debtor's application for writ of error by the Texas Supreme Court, the POA sought and obtained an order holding Debtor in contempt, and directing that Debtor be jailed until he purged the contempt by removing the mobile home and other personalty from the property. (Exhibit 13) . A second such order was entered on October 30, 1995. (Exhibit 14)

During 1998, the POA again sought a contempt order to

enforce the judgment it obtained. Debtor was jailed, and was subsequently released on personal recognizance on the condition that he immediately comply with the court's orders to remove all unapproved architectural improvements. Debtor complied with the order, and the contempt was purged, by order entered February 11, 1998. (Exhibit 16)

In the remainder of the state court action severed from resolution of the deed restriction issue, the POA sought damages, unpaid assessments, and attorney's fees and costs. Following a jury trial held during February, 1999, the jury found $13,850 in assessments, $78,000 in civil damages, and $276,102.59 in attorney's fees to the POA. No judgment was entered on the jury verdict because Debtor filed the instant bankruptcy case, thus imposing the automatic stay against further proceedings.

The parties stipulate that The value of the property is $100,900. (Exhibit 1)

The Instant Motions

In the instant motion for relief from stay, the POA seeks relief from stay in order to seek entry of judgment in the state court, and thereafter to seek foreclosure of Debtor's interest in the property.

In response, based on Debtor's assertion that the property is exempt, Debtor seeks avoidance of the lien asserted by the POA. Debtor also seeks disallowance of the POA's claim for attorney fees on grounds he is not responsible for the attorney fees because the POA was incorporated after he acquired the property.

The POA objects to Debtor's claim of exemptions in the property, on grounds Debtor maintains a separate homestead within the city of Houston, Texas.

Debtor contends that his "homestead" consists of a house located within the city of Houston, Texas, in which he and his family use space both for residence and office purposes, and a residential homestead located at the Del Lago property. He contends the POA is estopped from asserting that the property is

not his residence because Debtor would be living in a mobile home on the property but for the POA's having obtained injunctive relief requiring him to remove the mobile home.

Relief from Stay

Section 362(d) of the Bankruptcy Code provides in pertinent part:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay--
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if- -
>
> > (A) the debtor does not have an equity in such property; and
> >
> > (B) such property is not necessary to an effective reorganization.

11 U.S.C. §362(d).

In a hearing on a motion for relief from the stay, the party seeking relief has the burden of proof on the issue of debtor's equity in the property. The party opposing relief has the burden of proof on all other issues. 11 U.S.C. § 362(g).

What constitutes "cause" for the lifting of the stay pursuant to Section 362(d) (1) is not defined in the Bankruptcy Code and whether cause exists must be determined on a case by case basis. Allowing a matter to proceed in another forum may constitute cause for the lifting of the stay. In re Murray Industries, Inc., 121 B.R. 635 (Bankr. M.D. Fla. 1990).

In determining whether to lift the automatic stay to allow

litigation against a debtor to proceed outside this court, the court should determine: (1) whether lifting the stay will result in any great prejudice to the debtor or the bankruptcy estate; (2) whether any hardship to a nondebtor of continuation of the stay outweighs any hardship to debtor in lifting the stay; and (3) whether the creditor has a probability of prevailing on the merits of the case. In re Namazi, 106 B.R. 93 (Bankr. E.D. Va. 1989)

In the instant case, there is no reorganization contemplated, since this case is a Chapter 7 case. The issue of whether Debtor has equity in the property turns on the status of the various components of the POA's judgment against Debtor. The parties have stipulated as to the value of the property. However, the amount of the debt owing and whether such debt is secured by the property is hotly disputed.

The existence of this hotly contested issue, in a court of competent jurisdiction which has held numerous hearings in the matter over the course of ten years, itself constitutes cause for the lifting of the stay to permit the state court to enter its judgment, and to permit the pursuit of any appeals which the parties may wish to pursue. There is no persuasive showing of hardship to Debtor or to the POA in litigating to finality the proceeding pending in the state court. Considerations of comity and judicial economy weigh in favor of lifting the stay to permit the 284th Judicial District Court of Montgomery County, Texas to take the Cause No. 90-10-03568-CV to conclusion. The court concludes that the stay should be lifted for cause.

Allowance of Claim and Lien Avoidance

A proceeding to disallow a claim and to seek the avoidance of a lien requires the filing of an adversary proceeding. BR 3007. In the instant case, no adversary proceeding has been commenced. Moreover, the issues involved with respect to allowance of the claim and lien avoidance should await the resolution of the state court proceeding. The court concludes that the Motion to Disallow Claim and the Motion to Avoid Lien should be denied without prejudice to the filing of an adversary proceeding.

Exemptions

A party objecting to exemptions has the burden of proving that the exemptions are not properly claimed. Bankruptcy Rule 4003 (c)

The parties did not, in the evidence presented on the instant motions, address the issue raised in Debtor's brief (Docket No. 24) that Del Lago and Houston are part of one urban community, and that this enables him to claim a homestead consisting of a residence in Del Lago and a business location in the city of Houston. Since the issue is complex, and relates, *inter alia*, to the matters to be resolved by the state courts, the court concludes that the Objection to Exemptions should be abated pending further order of this court.

Based on the foregoing, a separate conforming Judgment will be entered.

Signed at Houston, Texas on this 8th day of July, 199º

/s/ LETITIA Z. CLARK

UNITED STATES BANKRUPTCY JUDGE

APPENDIX 2

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

US Court of Appeals

FILED
April 23, 2001

No. 00-20897

Summary Calendar

IN RE: PAUL E. NUNU,
Debtor,
PAUL E. NUNU; SHANDA NUNU,
Appellants,

VERSUS

DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before DAVIS, JONES and DeMOSS, Circuit Judges.

PER CURIAM:[1]

Paul E. Nunu and his wife Shanda Nunu appeal from a final judgment in an adversary proceeding incident to Nunu's Chapter 7 bankruptcy. They challenge the denial by both the District and Bankruptcy Courts of their residential urban homestead exemption as applied to property Nunu owns located in Del Lago Estates subdivision in Conroe, Texas. Nunu owns other property in Houston, Texas that is the site of a residence and Paul Nunu's business office. Nunu argues that he is entitled to a homestead exemption covering both properties which would entitle him to discharge the lien claimed on the Del Lago property by the creditor, Del Lago Estates Property Owner's Association.

Nunu argues first that the District Court erred by failing to give res judicata or collateral estoppel effect to certain statements in the state court judgment that is the basis of the Creditor's lien and in a Memorandum Opinion of the Bankruptcy Court. The validity of the homestead exemption was not an issue in the state court proceedings. Accordingly, it can have no res judicata or collateral estoppel effect in these proceedings. In addition, we agree with the District Court that the Bankruptcy Court was entitled to revise its preliminary findings following an abbreviated hearing on a motion and that the preliminary finding is not binding as the law of the case. U.S. v. O'Keefe, 1G9 F.3d 281, 283 (5th Cir. 1999) ; Meineke Discount Muffler v. Javnes, 999 F.2d 120, 122 (5th Cir. 120, 122 (5th Cir. 1993)

We also agree with the District Court's and Bankruptcy Court's determination that the Del Lago property was not "in the same urban area" as the Houston office/residence and. was not "used for the purposes of an urban home" which would qualify the Del Lago property for the Texas homestead exemption. Tex. Prop. Code §41.002(a). Whether a property constitutes a homestead is a question of fact which we review under the clearly erroneous standard. Gregorv V. Sunbelt Savings, F.S.B., 835 S.W.2d 155, 158 (Tex. App. - Dallas, 1992, writ denied). The

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[1]Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

factual bases for the courts' judgments are clearly set out in their opinions and supported by the record.

Nunu also challenges the validity of the creditor's lien on the Del Lago property. This challenge seeks to relitigate issues that were presented and decided in the state court litigation, which resulted in a consent judgment that Nunu's Del Lago lot was subject to the 1988 Restrictions on Del Lago subdivision lots and awarding damages. Those issues may not be relitigated here. We agree that the award for past assessments and attorney fees is secured by a lien on the Del Lago lot. Inwood North Homeowners Association, Inc. v. Harris, 736 S.W. 2d 632 (Tex. 1987) . Finally, since the Del Lago lot is not exempt from the bankruptcy estate as urban homestead property, Shanda Nunu has no right under Texas law to consent to or challenge any encumbrance.

Accordingly, we AFFIRM for essentially the reasons stated by the District Court in its Memorandum and Order dated August 31, 2000 and by the Bankruptcy Court in its Memorandum Opinion dated March 31, 2000.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

US Court of Appeals
FILED
May 21, 2001

No. 00-20897

In The Matter Of: PAUL E NUNU
Debtor

PAUL E NUNU; SHANDA NUNU
Appellants

V.

DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION
Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 4/23/01, 5 Cir., _____, _____F.3d_____)

Before DAVIS, JONES and DeMOSS, Circuit Judges

(×) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel, Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the petition for Rehearing En Banc is DENIED.

Entered For The Court:

/s/ W. Eugene Davis

United States Circuit Judge

Supreme Court U.S.
FILED
01 524 SEP 20 2001
OFFICE OF THE CLERK

NO. _____

IN THE

Supreme Court of the United States

PAUL E. NUNU and SHANDA NUNU,
Petitioners

v.

THE DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION,
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

APPENDICES 3, 4, 5, 6, 7 & 8

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ATTORNEYS FOR PETITIONERS

54.00

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
PAUL E. NUNU,	§	BR CASE NO. 99-31474-H3-7
	§	ADVERSARY NO. 99-3431
Debtor.	§	
	§	
	§	
PAUL B. NUNU and	§	
SHANDA NUNU,	§	
Appellants,	§	
	§	
v.	§	CIVIL ACTION NO. H-00-2244
	§	
DEL LAGO ESTATES	§	
PROPERTY OWNERS ,	§	
ASSOCIATION	§	
Appellee.	§	

MEMORANDUM AND ORDER

This bankruptcy appeal is before the Court on the Motion for Rehearing and/or New Trial ("Motion") [Doc. # 14] filed by Appellants Paul B. Nunu ("Nunu") and Shanda Nunu. Appellants argue that the Court in its Memorandum and Order dated August 31, 2000 ("August 31st Opinion") [Doc. # 12] erred by misapplying the law of the case doctrine and by using the wrong legal definition of "urban area." The Court has carefully considered Appellants' Motion and Appellee Del Lago Estates Property Owners Association's Response [Doe. # *15].* Based on the Court's review of these pleadings, the Court's review of its prior decision and the record on appeal at the time that decision was issued, and the applicable legal authorities, the Court concludes that the rulings in the August 31st Opinion were correct. This Court **denies** Appellants' Motion.

I. STANDARD FOR "MOTION TO RECONSIDER"

A motion for rehearing is appropriate only when the Court is presented with newly-discovered evidence, when the Court committed clear error, when there is an intervening change in controlling law, or when other highly unusual circumstances exist. *See Becerra v. Asher,* 921 F. Supp. 1538, 1548 (S.D. Tex. 1996), *aff'd,* 105 F.3d 1042 (5th Cir.), *Cert. denied,* 522 U.S. 1538 (1997). "[N]either a Rule 59 nor a Rule 60 motion provides the proper vehicle for rehashing old arguments *Resolution Trust Corp. v. Holmes,* 846 F. Supp. 1310, 1~16(S.D.Tex. 1994).

II. DISCUSSION

A. "Law of the Case" Doctrine

In their appeal. Appellants argued that the Bankruptcy Court erred in failing to apply the "law of the case" doctrine when it made a finding which was inconsistent with a statement made in a prior ruling. This Court noted that the "law of the case doctrine is a matter of judicial discretion rather than judicial power when a court is reviewing its own prior decision." *Perillo v. Johnson.* 205 F.3d 775, 780 (5th Cir. 2000); *see also United States v. O'Keefe,* 169 F.3d 281, 283 (5th Cir. 1999). The Court also noted that a court's findings "after an abbreviated hearing" are not binding as the law of the case, citing *Meineke Discount Muffler v. Jaynes,* 999 F.2d 120, 122 n.3 (5th Cir. 1993).

The Bankruptcy Court and this Court correctly noted that the Bankruptcy Court's statement in its first ruling was made in connection with an expedited decision following a limited evidentiary hearing. Subsequently, after a full trial on the merits of the adversary proceeding, the Bankruptcy Court issued findings of fact and conclusions of law based on the more complete record. This Court correctly held that the Bankruptcy Court did not abuse its discretion when the later finding conflicted with the prior statement. Appellants raise no new arguments which indicate that either this Court or the Bankruptcy Court applied the law of the case doctrine in an erroneous manner.

B. Definition of "Urban Area" for Homestead Purposes

Appellants argued on appeal that the Bankruptcy Court erred in finding that the Del Lago Property was not part of Appellants' urban homestead, specifically challenging the Bankruptcy Court's finding that Appellants' property in the City of Houston and their vacant lot in Del Lago Estates are not "in the same urban area." Appellants' argument that the Bankruptcy Court was required to borrow a definition of "urban area" from other, unrelated statutory provisions was raised on appeal and rejected by this Court. Appellants offer no new arguments, and the Court again finds that the Bankruptcy Court considered the relevant factors to decide the fact question regarding whether Appellants' two properties were in the "same urban area.

III. CONCLUSION AND ORDER

The issues raised by Appellants in their Motion were raised on appeal, were fully considered by the Court, and were rejected in the Court's August 31st Opinion. Appellants present no new arguments or authorities, and the Court concludes that its prior decision on these issues was correct. Accordingly, for the reasons stated in this Memorandum and Order and in the August 31st Opinion, it is hereby

ORDERED that Appellants' Motion for Rehearing and/or New Trial [Doc. #14] is DENIED.

SIGNED this 30th day of September, 2000, at Houston, Texas.

/s/ Nancy F. Atlas

UNITED STATES DISTRICT JUDGE

Filed October 2, 2000

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
PAUL E. NUNU,	§	BR CASE NO. 99-31474-H3-7
	§	ADVERSARY NO. 99-3431
Debtor.	§	
	§	
	§	
PAUL E. NUNU and	§	
SHANDA NUNU,	§	
Appellants,	§	
	§	
v.	§	CIVIL ACTION NO. H-00-2244
	§	
DEL LAGO ESTATES	§	
PROPERTY OWNERS ,	§	
ASSOCIATION	§	
Appellee.	§	

FINAL JUDGMENT

For the reasons stated in this Court's Memorandum and Order issued this day, the United States Bankruptcy Court's Memorandum Opinion and Judgment, each entered March 31, 2000, and the Bankruptcy Court's Supplemental Findings of Fact and denial of Appellants' Motion for New Trial, entered April 28, 2000, are **AFFIRMED**

This is a **FINAL JUDGMENT.**

SIGNED at Houston, Texas, this 31st day of August 2000.

/s/ NANCY F. ATLAS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
PAUL E. NUNU,	§	BR CASE NO. 99-31474-H3-7
	§	ADVERSARY NO. 99-3431
Debtor.	§	
	§	
	§	
PAUL E. NUNU and	§	
SHANDA NUNU,	§	
Appellants,	§	
	§	
v.	§	CIVIL ACTION NO. H-00-2244
	§	
DEL LAGO ESTATES	§	
PROPERTY OWNERS	§	
ASSOCIATION,	§	
Appellee.	§	

MEMORANDUM AND ORDER

This case is before the Court on appeal from the United States Bankruptcy Court for the Southern District of Texas. The Court has jurisdiction pursuant to 28 U.S.C. § 158.

Appellants, Paul E. Nunu ("Nunu") and Shanda Nunu. challenge the Bankruptcy Court's Memorandum Opinion ("March 31 Opinion") and Judgment entered March 31, 2000, and the Supplemental Findings of Fact ("Supplemental Findings") and denial of their Motion for New Trial entered April 28, 2000. The Bankruptcy Court held that Nunu's property located in the Del Lago Estates subdivision ("Del Lago Property") was not Appellants' homestead under the Texas Property Code. The Bankruptcy Court further held that Appellee Del Lago Estates Property Owners Association had an enforceable lien against the Del Lago Property.

Appellants raise four issues on appeal. Specifically, Appellants allege that the Bankruptcy Court "ignored" its prior

finding in connection with its decision to lift the stay, that the Bankruptcy Court erred in finding that the Del Lago Property was not Appellants' residential homestead, that the Bankruptcy Court erred in finding that Appellee has a valid lien and that the Bankruptcy Court erred in denying Appellants' Motion for Summary Judgment.[1] Appellants argue that, as to each of these issues, the determinative questions are (1) whether the Del Lago Property is the residential homestead of Appellants; (2) whether the doctrine of issue preclusion permitted Appellants to rely on the Bankruptcy Court's prior finding in connection with the entry of an order lifting the automatic stay; and (3) whether the Bankruptcy Court used the wrong definition of "urban area" is reaching its decision. *See* Brief of Appellants [Doc. # 6], at 1.

The Court has thoroughly reviewed the pleadings. the briefs submitted by the parties. the Bankruptcy Court record designated by the parties, and the applicable legal authorities. Based on this review, the Court concludes that the Bankruptcy Court's Memorandum Opinion and Judgment were well-reasoned and correct. This Court affirms the decision of the Bankruptcy Court.

I. STANDARD OF REVIEW

The bankruptcy judge's conclusions of law are reviewed *de novo. In re Texas Securities, Inc.,* 218 F.3d 443, 445 (5th Cir. 2000). The bankruptcy court's findings of fact are subject to review under the "clearly erroneous" standard, and mixed questions of law and fact are reviewed *de novo. See In re National Gypsum Co.,* 208 F.3d 498, *504 (5th* Cir. 2000) *(pet. for cert. filed June 29, 2000).* Matters within the bankruptcy judge's discretion are reviewed for an abuse of discretion. *Matter of Mendoza,* 111 F.3d 1264, 1270 (5th Cir. 1997). This Court "may affirm if there are grounds in the record to support the judgment, even if those grounds were not relied upon by the courts below." *Matter of Besing,* 981 F.2d 1488, 1494(5th Cir.), *cert. denied,* 510 U.S. 821 (1993).

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[1] Nunu sought summary judgment on the homestead issue and on the lien validity issue.

II. BACKGROUND

The Bankruptcy Court fully described the factual and procedural background of this case in the March 31 Opinion. *See* March 31 Opinion, at 2-6. This Court, finding the Bankruptcy Court's factual recitation to be supported by the evidence presented at the adversary trial, adopts and incorporates herein the Bankruptcy Court's statement of the "Background" of this case.

In 1982, Nunu purchased property located at 1235 Harvard, in the Heights section of Houston. Texas (the "Harvard Property"). Nunu maintained his law offices on the first floor of the Harvard Property and used the second floor as his residence.

In 1986, Nunu acquired the Del Lago Property subject to restrictions and covenants filed in 1982 in the real property records of Montgomery County, Texas (the "1982 Restrictions").

In 1987, Appellee Del Lago Estates Property Owners Association ("POA") was incorporated. In 1988, the POA recorded amended restrictions and covenants (the "1988 Restrictions"). In July 1988, Nunu designated the Harvard Property as a homestead in Harris County and designated the Del Lago Property as a homestead in Montgomery County.[2]

On December 25, 1988, Nunu and Shanda Nunu were married.

On March 3, 1989, Nunu moved a mobile home onto the Del Lago Property. On March 6, 1989, the POA sued Nunu in state court asserting that the presence of the mobile home violated the 1982 Restrictions and the 1988 Restrictions. Nunu argued that neither the 1982 Restrictions nor the 1988 Restrictions applied to his interest in the Del Lago Property. The state court entered a consent judgment holding specifically that the 1988 Restrictions applied to the Del Lago Property. The state court's judgment was affirmed by the Texas Court of Appeals, and the

---

[2] Nunu did not, however, claim a homestead exemption on the Del Lago Property for tax purposes. *See* Transcript of Adversary Trial ("Tr."). at 44.

Texas Supreme Court denied Nunu's application for a writ of error. Beginning in October 1995, the POA sought to enforce its judgment. Nunu was held in contempt and jailed for refusing to remove the mobile home. Nunu finally complied with the state court judgment in 1998. Following a jury trial on the issue of damages. assessments, attorney's fees and costs in connection with the POA's lawsuit, the jury returned a verdict in favor of the POA in the amount of $13,850.00 in assessments owed pursuant to the 1988 Restrictions, $78,000.00 in civil damages, and $276,102.59 in attorney's fees.

Prior to entry of the final judgment on the jury verdict, Nunu filed a petition under Chapter 7 of the United States Bankruptcy Code. The Bankruptcy Court granted the POA's request for relief from the automatic stay, and the state court entered final judgment on September 7, 1999.

This adversary proceeding was tried to the Bankruptcy Court on November 3, 1999. The Bankruptcy Court issued her March 31 Opinion and subsequently denied Appellants' Motion for a New Trial.

Appellants filed a timely Notice of Appeal. The parties have submitted briefs in compliance with Bankruptcy Rules 8009 and 8010. This Court, having examined the briefs and the record on appeal, concludes that oral argument is unnecessary. This appeal is now ripe for decision.

III. DISCUSSION

The Court has reviewed the Bankruptcy Court's factual findings for clear error and finds that the facts set forth in the March 31 Opinion are fully supported by the evidence presented at the bench trial in the adversary proceeding. The Court has considered the Bankruptcy Court's legal rulings *de novo* and concludes that Appellants' arguments are without merit.

A. Bankruptcy Court's Prior Finding

The Bankruptcy Court conducted a limited evidentiary hearing in connection with Appellee's request for relief from the automatic stay. Following this limited hearing, the Bankruptcy Court granted relief from the stay by Memorandum Opinion

dated July 8, 1999 (the "July 8 Opinion"). In that opinion, the Bankruptcy Court described the "Background" of the case and included the following sentence: "On March 3, 1989, [Nunu] moved a mobile home to the property, and began living there with his wife."

Following the full trial on the merits of the adversary proceeding, the Bankruptcy Court found that the Del Lago Property was not Appellants' homestead. Appellants complained that this finding was inconsistent with the sentence contained in the July 8 Opinion and quoted above. In response, the Bankruptcy Court issued its Supplemental Findings, noting that the subject sentence was contained in the "Background" section of an opinion issued after receiving limited evidence. The Bankruptcy Court stated:

> to the extent the court's Findings of Fact in the Memorandum Opinion entered in the instant adversary proceeding on March 31, 2000 may be in conflict with the brief background statement contained in the July 8. 1999 Memorandum Opinion with respect to Defendant's motion for relief from stay, the detailed findings contained in the Memorandum Opinion of March 3 1. 2000 control.

March 31 Opinion, at 2-3.

Appellants' argue that the Bankruptcy Court erred in failing to apply the "law of the case" doctrine to the statement **in** the July 8 Opinion. "The law of the case doctrine is a matter of judicial discretion rather than judicial power when a court is reviewing its own prior decision." *Pen/b v. Johnson,* 205 F.3d 775, 780 (5th Cir. 2000); *see also United States v. O'Keefe,* 169 F.3d 281, 283 (5th Cir. 1999). Although discretionary, a court frequently will apply the law of the case doctrine to its own prior decisions ***unless*** the evidence introduced during a subsequent evidentiary hearing or trial is substantially different. *See O'Keefe,* 169 F.3d at 283. A court's findings "after an abbreviated hearing" are not binding as the law of the case. *See Meineke Discount Muffler v. Jaynes.* 999 F.2d 120, 122 n.3 *(5th* Cir. 1993) (citing *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981)).

Here, the Bankruptcy Court correctly noted that the initial statement was made in connection with an expedited decision following a limited evidentiary hearing. After a full trial on the merits of the adversary proceeding, the Bankruptcy Court issued findings of fact and conclusions of law based on the more complete record. The Bankruptcy Court did not abuse its discretion in declining to apply the law of the case doctrine to its "Background" statement in the July 8 Opinion.

B. Bankruptcy Court's Findings and Conclusions Regarding Homestead Status of Del Lago Property

Appellants argued to the Bankruptcy Court that the Del Lago Property, together with the Harvard property, was their urban homestead. Under Texas law, more than one piece of property "in the same urban area" and "used for the purposes of an urban home or a place to exercise a calling or business" can be combined to form a "one acre" urban homestead. *See* TEX. PROP. CODE § 41.002(a).

Appellants argue that the Bankruptcy Court erred in finding that the Del Lago Property was not part of Appellants' urban homestead. Whether a piece of property constitutes a homestead is a question of fact. *See Gregory v. Sunbelt Savings FSB,* 835 S.W.2d 155, 158 (Tex. App. -- Dallas 1992, writ denied); *see also Matter of Crowell,* 138 F.3d 1031, 1033 (5th Cir. 1998) (whether homestead is urban is question of fact).

1. "Same Urban Area"

The Bankruptcy Court's finding that the Harvard Property and the Del Lago Property are not "in the same urban area" is fully supported by the evidence. The Bankruptcy Court found the testimony of Vernon Henry to be particularly persuasive on this issue, and that finding is not clearly erroneous. Henry testified that the Del Lago Property and the Harvard Property are 58 miles apart. Tr. at 48. Driving time between the two properties in "very, very light traffic" was one hour and five minutes. *Id.* at 51.

Henry testified that the Harvard Property, located in the Heights, is an older part of the City of Houston proper which is completely developed. *Id* at 49. The Del Lago Property, on the

other hand, is located in Montgomery County outside the City of Houston. Henry testified that the characteristics of the two areas are different, "the driving patterns are different, the service patterns are different, and the taxing patterns are certainly different." *Id* at 50-51.

Henry also testified regarding the large mix of land use along 1-45, the primary connection between the Harvard Property in the City of Houston and the Del Lago Property in Montgomery County. *Id.* at 51. He noted the gaps of undeveloped property and otherwise vacant properties along 1-45. *Id.* Henry also noted that one must pass through a number of different political subdivisions when traveling between the Harvard Property and the Del Lago Property. *Id.* at 52. Based on these factors, Henry presented his expert opinion that the Del Lago Property and the Harvard Property are not in the same urban area.

Appellants rely heavily on the definition of "urban area" contained in the Texas Parks and Wildlife Code, the Texas Transportation Code, and the Texas Insurance Code. These statutes define "urban area" by referring to the Standard Metropolitan Statistical Area ("SMSA") as determined by the most recent federal census. *See, e.g.,* TEX. PARKS AND WILDLIFE CODE, § 24.00 1. The 1990 Houston SMSA includes all of Harris and Montgomery Counties. Appellants cite no legal authority, however, for their argument that the inclusion of both Harris and Montgomery Counties in the 1990 Houston SMSA requires a finding that the Harvard Property and the Del Lago Property are in the "same urban area" for purposes of an urban homestead under the Texas Property Code.

Evidence presented at trial provides a rational basis for rejecting Appellants' invitation to use the U.S. Census designation to define "same urban area" for homestead purposes. According to its own terms, the census information is to be used exclusively for statistical purposes. Tr. at 52. Houston is one of approximately 76 metropolitan areas into which the entire United States is divided. *Id* at 61. Many areas in the Houston metropolitan statistical area are distinctly rural. *Id* at 63. This Court rejects Appellants' argument that the inclusion of both the Harvard Property area and the Del Lago Property area in the U. S. Census's Houston SMSA requires a finding that the

properties are in the "same urban area for purposes of the Texas Property Code's definition of an urban homestead.

2. Which Property Is Appellants' Homestead

Texas homestead laws are construed liberally *See In re Niland,* 825 F.2d 801, 815 (5th Cir. 1987). The party seeking homestead protection has the "burden to establish the homestead character of [the] property." *Matter of Bradley,* 960 F.2d 502, 507 (5th Cir. 1992), *cert. denied,* 507 U.S. 971 (1993). Having found that the two properties are not in the same urban area and cannot both be considered as Appellants' urban homestead under the Texas Property Code, the Bankruptcy Court found that the Harvard Property, not the Del Lago Property, was the Appellants' homestead. This finding is fully supported by the evidence presented at trial.

It is undisputed that Nunu began living in the Harvard Property in early 1982. He and Shanda Nunu lived there after their marriage in December 1988. The homestead character of the Harvard Property is presumed to continue unless it loses its homestead character by death, abandonment, or alienation. *See id* at 507 n.8 (citing *Garrard v. Henderson,* 209 S.W.2d 225 (Tex. Civ. App. -- Dallas 1948, no writ)). To abandon an existing homestead, the property owner must demonstrate a "present, definite and permanent intent to cease use of the property for homestead purposes." *Bradley,* at 508 n. 11 (quoting *West Texas State Bank v. Helms,* 326 S.W.2d 47, 49 (Tex. Civ. App. -- Eastland 1959, no writ)). "While occupying a piece of property as homestead, a person cannot establish a homestead right in another place by attempting to live there in the future." *Caulley v. Caulley,* 806 S.W.2d 795, 797 (Tex. 1991) (internal quotations omitted).

Appellants moved a mobile home onto the Del Lago Property in March 1989. but the Bankruptcy Court found that Appellants' allegation that they lived there was not credible. This finding is supported by the testimony of two witnesses who live in Del Lago Estates and who each regularly walked by Appellants' property during the period the mobile home was on the property. Charlotte Sherri Schmitt testified that "there was never signs of anybody longer than a long weekend." Tr. at 66. Schmitt also

testified that she did not see anyone living at the Del Lago Property on a full-time basis. *Id* at 68. Herb Hilton, another Del Lago Estates resident, testified that he walks by the subject property every day and "there was never any indication that anyone was living there." *Id* at 71.

This evidence supports the Bankruptcy Court's finding that the Del Lago Property was **not Appellants' homestead.** This Court, reviewing the finding for clear error, affirms.[3]

C. Bankruptcy Court's Conclusion Regarding Validity of Appellee's Lien

In the state court litigation, Nunu argued that the 1982 Restrictions and the 1988 Restrictions did not apply to the Del Lago Property. The state court rejected Nunu's argument, holding specifically that the 1988 Restrictions applied to the Del Lago Property. The Texas Court of Appeals affirmed, and the Texas Supreme Court denied review. Nunu now seeks to challenge the state court judgment in federal court.[4]

The *Rooker-Feldman* doctrine "provides that lower federal courts lack jurisdictional authority to sit in appellate review of state court decisions. In a nutshell, the doctrine holds that inferior federal courts do not have the power to modify or reverse state court judgments." *Matter of Reitnauer,* 152 F.3d 341, 343 (5th Cir. 1998). The district court and the bankruptcy court may not sit in appellate review to determine the validity of a prior state court judgment which has become final. *Id* at 344. "The

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[3] Shanda Nunu's claims of due process rights under the Texas Constitution and the Texas Family Code are dependent on the existence of a homestead interest in the Del Lago Property. Having affirmed the Bankruptcy Court's finding that the Del Lago Property was not Appellants' homestead, this Court need not further address Shanda Nunu's claims.

[4] Nunu also challenges the amount of attorney's fees awarded in the state court judgment. To the extent review of this limited issue is not barred by the *Rocker-Feldman* doctrine because it is not yet final, this Court does not find the amount of attorney's fees to be unreasonable in light of the many years of various proceedings, including contempt proceedings and federal civil rights litigation, required for the POA to enforce the 1988 Restrictions against Nunu and the Del Lago Property.

parties contested, and the state court adjudicated, the [relevant] issue in a Texas court of competent jurisdiction. While that adjudication was immediately appealable to the Texas Court of Appeals, it was not appealable...to the federal courts." *Id* The Bankruptcy Court properly accepted the state court's judgment regarding the applicability of the 1988 Restrictions.

D. Conclusion

The Court, having reviewed the Bankruptcy Court's factual determinations for clear error and having reviewed *de novo* the Bankruptcy Court's decision on the legal issues, adopts the Bankruptcy Court's March 31 Opinion, together with the Supplemental Findings, as part of this Memorandum and Order. The decision of the Bankruptcy Court is affirmed.

IV. CONCLUSION AND ORDER

The Bankruptcy Court's findings of fact are fully supported by the pleadings and the evidence presented during the bench trial. The Bankruptcy Court's legal conclusions. reviewed by this Court *de novo,* are correct. This Court adopts the Bankruptcy Court's reasoning and conclusions on the merits of Appellants' claims. Accordingly, it is hereby

ORDERED that the Bankruptcy Court's March 31. 2000 Memorandum Opinion and Judgment are **AFFIRMED.** The April 28. 2000 Supplemental Findings of Fact denying Appellant's Motion for New Trial is likewise **AFFIRMED.**

A final order will be issued separately.

SIGNED this 31st day of August, 2000. at Houston, Texas.

/s/ Nancy F. Atlas

United States District Judge

APPENDIX 5

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE PAUL E. NUNU,	)	CASE N0. 99-31474-H3-7
	)	
Debtor,	)	
	)	
	)	
PAUL E. NUNU and SHANDA NUNU,	)	
	)	
	)	
Plaintiffs,	)	
	)	ADV. NO. 99-3431
	)	
DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION,	)	
	)	
	)	
Defendant.	)	
	)	

SUPPLEMENTAL FINDINGS OF FACT

The court has considered the Plaintiffs' Motion for New Trial" (Docket No. 33) filed in the above captioned adversary proceeding. In the instant petition, the Plaintiffs in the instant adversary proceeding contend that the court' a Memorandum Opinion of July 8, 1999 in the Chapter 7 case filed, by Plaintiffs precludes the court' a finding in the instant adversary proceeding that property claimed by Debtors to be their residential homestead is not their homestead. The court makes the following supplemental Findings of Fact. To the extent any of the Findings of Fact are considered Conclusions of Law, they are adopted as such.

The court's Memorandum Opinion of July 8, 1999 was issued after a hearing conducted on limited evidence with respect to the

motion for relief from stay filed in the Plaintiffs' Chapter 7. case by the Defendant in the instant adversary proceeding. The sentence of which Plaintiffs complain: "On March 3, 1989, Debtor moved a mobile home to the property, and began living there with his wife," is contained in a "background" section of the opinion, drafted in order to frame the issues raised in that motion.

Upon trial in the instant adversary proceeding, the court took extensive evidence on the issue of the scope of the Plaintiffs' use of the property from 1989 through the date of trial. Thus, to the extent the court's Findings of Fact in the Memorandum Opinion entered in the instant adversary proceeding on March 31, 2000 may be in conflict with the brief background statement contained in the July 8, 1999 Memorandum Opinion with respect to Defendant' s motion for relief from stay, the detailed findings contained in the Memorandum Opinion of March 31, 2000 control.

Based on. these Supplemental Findings of Fact, it is

ORDERED that the "Plaintiffs' Motion for New Trial (Docket No. 33) is denied.

Signed at Houston, Texas on this 27th day of April, 2000

/s/ Letitia Z. Clark

United States Bankruptcy Judge

APPENDIX 6

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE PAUL E. NUNU, Debtor, PAUL E. NUNU and SHANDA NUNU, Plaintiffs v. DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION, Defendant.	)	CASE NO. 99-31474--H3-7 ADV. NO. 99-3431

JUDGMENT

Based on the separate Memorandum Opinion signed this same date,

1) Debtor's homestead consists of property located at 1235 Harvard, Houston, Texas.

2) Defendant's lien attaches to property at 35 La Jolla Circle, Montgomery County, Texas, to the extent of the assessments and attorney' s fees awarded by the 284th Judicial District Court of Montgomery County, Texas.

3) Defendant's claim is allowed as filed. The portion of the claim attributable to civil damages pursuant to Section 202.004 of the Texas Property Code is unsecured.

4) Shanda Nunu has no right with respect to property at 35 La Jolla Circle, Montgomery County, Texas, arising from Section 5.001 of the Texas Family Code.

SO ORDERED.

Signed at Houston, Texas on this 31 day of March 2000.

/s/ Letitia Z. Clark

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE		
PAUL E. NUNU,	)	CASE NO. 99-31474-H3--7
	)	
Debtor,	)	
PAUL E. NUNU	)	
and SHANDA NUNU,	)	
Plaintiffs,	)	
v-.	)	ADV. NO. 99-3431
DEL LAGO ESTATES	)	
PROPERTY OWNERS	)	
ASSOCIATION,	)	
Defendant.	)	

MEMORANDUM OPINION

The court has held a trial in the above captioned adversary proceeding. After considering the pleadings, the evidence, and the briefs, the court makes the following Findings of Fact and Conclusions of Law. A separate conforming Judgment will be entered. To the extent any of the Findings of Fact are considered Conclusions of Law, they are adopted as such. To the extent any of the Conclusions of Law are considered Findings of Fact, they are adopted as such.

Background

In the instant adversary Proceeding, Paul E. Nunu ("Debtor") and his non-debtor wife, Shanda Nunu, (collectively, "Plaintiffs") seek a declaratory judgment determining that real property located at 35 La Jolla Circle, Montgomery County, Texas, (the "La Jolla Property") is their residential homestead, determining the extent to which the lien asserted in the La Jolla Property by, the Del Lago Estates Property Owners' Association ("POA") is invalid or is subject to avoidance pursuant to 11 U.S.C. § 522(f), and determining that the claim of the POA is unsecured. Debtor also owns and occupies property located in Houston, Harris County, Texas.

On January 15, 1982, Debtor purchased property located at 1235 Harvard, in Houston, Harris *County,* Texas (the "Harvard Property"). (Debtor' s Exhibit 3 J.

Debtor immediately occupied the Harvard Property as his residence, and when he became licensed to practice law in November, 1982, opened a law office at the Harvard Property.

(Testimony of Bill Ryan).

On October 2, 1382, the developers of Del Lago Estates recorded restrictions and covenants (the "1982 Restrictions"), in the real property records of Montgomery County, Texas. (POA exhibit 2).

On September 10, 1986, Debtor acquired the La Jolla Property. (POA Exhibit 3).

The Harvard Property is located approximately two miles northwest of downtown Houston, Texas, in the Heights subdivision of Harris County. The La Jolla Property is located approximately ten miles west of Conroe, Texas, in the Del Lago Estates subdivision on the western shore of Lake Conroe in an unincorporated area of Montgomery County, Texas. The Harvard Property and the La Jolla Property are located approximately 58 miles apart. They are in different counties, and are served by different municipal utility entities, hospital districts, school districts, and sheriffs.

On April 13, 1987, the Del Lago Estates POA was incorporated. (POA Exhibit 4). On January 12, 1982, the POA recorded amended restrictions and covenants (the "1988 Restrictions") . (POA Exhibit 5)

On July 10, 1988. Debtor executed two affidavits. One designated. the Harvard Property as homestead and. was filed with the deed records of Harris County, Texas. The other designated the La Jolla Property as homestead and was filed with the deed records of Montgomery County, Texas.

On December 25, 1988, Debtor and Shanda Nunu were married.

On March 3, 1989, Debtor moved a mobile home on to the property.

On March 6, 1989, the POA filed suit, in the 284th Judicial District Court of Montgomery County, Texas, seeking to require Debtor to remove the mobile home, on grounds the mobile home violated the 1982 Restrictions and the 1988 Restrictions. (POA Exhibit 7). Debtor asserted in that suit that neither the 1982 Restrictions nor the 1988 Restrictions applied to his interest in the property. (POA Exhibit 8). Shanda Nunu was not a party to the Montgomery County suit. -

The state court severed the issue of whether the property was burdened with the deed restrictions, from damages and maintenance and other fees. The state court entered a consent judgment holding that Debtor's property was indeed burdened with the 1988 Restrictions.[1] (POA Exhibit 7). On appeal by Debtor, the state court's judgment was affirmed by the Texas Court of Appeals. (POA Exhibit 8). The Texas Supreme Court denied Debtor's application for writ of error. (POA Exhibit 9).

On. October 17, 1995. after the denial of Debtor's application. for writ of error by the Texas Supreme Court, the POA sought and obtained an order holding Debtor in contempt, and directing that Debtor be jailed until he purged the contempt by removing the mobile home and other personalty from the property. (POA Exhibit 13). A second such order was entered on October 30, 1995. (POA Exhibit 14)

During 1988, the POA again sought a contempt order to enforce the judgment it obtained. Debtor was jailed, and was subsequently released on personal recognizance on the condition that he immediately comply with the court's orders to remove all unapproved architectural improvements. Debtor complied with the order, and the contempt was purged, by order entered February 11, 1998. (POA Exhibit 16)

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[1] The state court' a judgment did not address the question of whether Debtor' a La Jolla property was burdened with the 1982 Restrictions. Since the 1982 Restrictions were ut place before Debtor acquired the property, the court concludes his property is burdened. by the 1982 Restrictions. See Inwood North Homeowners' Aas'n Inc. v. Harris, 736 S.W.2d ~32 (Tex. 1987)

In the remainder of the state court action severed from resolution, of the deed restriction issue, the POA sought damages, unpaid assessments, and attorney's fees and costs. Following a jury trial held during February, 1999, the jury found $13,850.00 in assessments, $78,000.00 in civil damages, and $276,132.59 in attorney's fees to the POA.

On February 11, 1999, before judgment was to be entered on the verdict in the state court, Debtor filed the petition in the instant Chapter 7 case. The POA sought and obtained relief from the automatic stay (Docket No. 31), and judgment was entered by the state court on September 7, 1999. (POA Exhibit 26).

In the judgment entered by the state court on September 7, 1999, the POA was awarded $13,850.00 for all annual assessments owing pursuant to the 1988 Restrictions, $78,000.00 in civil damages pursuant to Section 202.004 of the Texas Property Code, and $276,102.59 in attorney's fees. The POA was also awarded additional attorney's fees in the event of appeal, and was awarded costs. (POA Exhibit 19). Debtor has filed a motion for new trial in the state court, which remained pending on the date of the trial in the instant adversary proceeding.

"Dual Homesteads"

In the instant adversary proceeding, Plaintiffs seek a determination that they own the La Jolla property as a homestead. The POA in its answer argues that Plaintiffs use the Harvard Property as a homestead. Plaintiffs at trial argued that they can have a homestead. consisting of both the Harvard. Property, as a business homestead. and the La Jolla Property, as a residential home stead.

The POA contends that Plaintiffs cannot have a homestead consisting of both the Harvard Property and the La Jolla Property, because the two properties are 58 miles apart, and are located in separate areas. The POA contends that, because Plaintiffs have not lived at the La Jolla Property, it is not their residential homestead.

Section 4I002(a) of the Texas Property Code, as it was in effect on the petition date in the instant case provides:

> (a) If used for the purposes of an urban home or a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than one acre of land which may be in one or more lots, together with any improvements thereon.

Tex. Prop. Code § 41.002(a).

An amendment to Section 41.002(a), which was adopted during 1999, and became effective on January 1, 2000, requires, *inter alia*, that the "one or more lots" which may comprise an urban homestead be contiguous.[2] Prior to the 1999 Amendment, the Texas Supreme Court had held that a homestead may consist of a business and a residence not on contiguous lots. Rock Island Plow Co. v. Alten, 102 Tex. 366, 116 S.W. 1145 (Tex. 1909); ~ of El Paso v. Lone, 209 S.W.2d 950 (Tex. Civ. App. --:21 Paso 1947, writ ref'd n.r.e.).

The urban homestead contemplates one or more lots used for the purposes specified in the Texas Constitution located in one urban community, whether governed by one or more municipal bodies. The urban homestead does not contemplate lots situated in widely separated urban communities. Purdy v. Grove, 35 S.W.2d 1078 (Tex. Civ. App.--Eastland 1931, writ ref'd) . In Purdy, the court denied treatment as a business homestead of property located in Gorman, Texas, when Purdy's residence homestead was located in Abilene, Texas, 82 miles away. Thus resolution of the homestead issue turns, in part, on whether the

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2 Section 41.002(a) was amended by the Texas Legislature in 1999 to provide:

> (a) If used for the purposes of an u.rban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.

1999 Tex. Sess. I~aw Serv. CI:i. 1510 (S.B. 49.6).

By the terms of the amendment to the Texas Property Code, after approval of an amendment to the Texas Constitution, the amendment to Section 41.002(a) is scheduled to become effective January 1, 2000.

Harvard Property and the La Jolla Property are in the same urban area.

The POA contends that the La Jolla Property and the Harvard Property are not in the same urban area. In support of this contention, the POA presented the expert testimony of Vernon G. Henry.[3]

Henry testified that he has been a land use planning consultant for over 35 years, has been in his own practice since 1967, and is certified as a land use planner by the American Institute of Certified Planners. He testified that his experience includes the analysis and design of projects for the development of, land, and that he was involved with the initial development of Walden, a residential community on Lake Conroe, and with the development of Bentwater, a recent development of homes across Lake Conroe from Del Lago Estates. He testified that he has analyzed property for development in both urban and rural areas in the vicinity of Houston. He testified that he was not instructed by the POA as to what conclusion to reach as to whether the La Jolla Property is located in the same urban area as the Harvard Property. He was a credible and competent witness.

Henry testified that he visited the Harvard Property, and that the Heights area, in which the Harvard Property is located, is a highly urban area, fully developed, with few vacant lots. Some older homes in the area have been torn down and reconstructed as homes and. businesses. He testified that the Heights area is a. highly dense area, with a large population per square mile in the entire area.

Henry- testified that he drove to the La Jolla Property from the Harvard Property. He testified that the drive took an hour and five minutes in light traffic. He testified that he observed

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[3] The POA has also designated the expert testimony of Doug Eustice, an appraisere with the Harris County Appraisal District, and Steve Compton, an appraiser with the Montgomery County Appraisal District Both Eustice and Compton testified that the homestead exemption allowed for tax purposes was separately defined and designed for different purposes from homestead under the Texas Property Code. Accordingly, their testimony with respect to designation of homestead for tax purposes is not accorded much weight.

mostly commercial property along the frontage of Interstate Highway 45, which is the main corridor between Houston and Conroe. He also testified that he observed gaps in the commercial property, consisting of undeveloped tracts, and that he observed many undeveloped tracts in the areas behind the highway frontage.

In Henry's opinion, the La Jolla Property is an urban area. However, it is Henry's opinion that the urban area in which the La Jolla Property is located is suburban Conroe, and is a separate urban area from the Houston urban area.

Henry testified, in response to Debtor' s use of Census Bureau statistical designations of metropolitan areas, that he has never used such designations to determine whether properties are in the same urban area. He testified that there are both urban and rural areas contained in the Houston "Metropolitan Statistical Area" as defined by the Census Bureau.

Henry testified that he reviewed. Bulletin. No. 99-04 of the Office of Management and Budget, which specifies the uses of the statistical designations of the Census Bureau.. With respect to nonstatistical uses of the designations, Bulletin No. 99-04 provides that it is the sponsoring agency' s responsibility to ensure that the definitions are appropriate for such use. (POA Exhibit G5). There is no evidence that either the Office of Management and Budget or the Census Bureau has approved or supported the use of the designation of metropolitan statistical areas for determining whether two parcels of property are located in the same, urban area for purposes of property codes or determination of lien status.

Plaintiffs contend that the Harvard Property and the La Jolla property are in the same urban area. Plaintiffs' evidence in support of this contention consists of the testimony of Bill Ryan and Thomas Bray, proffered as experts.

Ryan, who is an attorney, testified that he has known Debtor since he and Debtor were in law school together. He testified that he has visited the La Jolla Property approximately 50 to 60 times. He testified that he and Debtor "used. to go up there to go fishing." He testified that the lifestyle in the area is a "city

lifestyle." He testified that most of the area is developed as a subdivision with homes, and that one portion of the area has been developed as a hotel. He testified that he was aware that Plaintiffs had brought a mobile home to the La Jolla Property, and believed they had built a "bath house," a fence, a bulkhead, a pier, and had planted trees at the La Jolla property. He testified that Plaintiffs did not always eat and sleep at the La Jolla Property, but that he believes Plaintiffs did so occasionally.

Ryan testified that he believes the drive time between the Harvard Property and the La Jolla Property to be approximately 45 minutes to one hour, if there is no traffic. He testified that he believes the Harvard Property and the La Jolla Property to be in the same urban area. He testified that he reached the conclusion that the Harvard Property and the La Jolla Property are in the same urban area by applying a "common sense" test, and by using the statistical reporting areas of the Census Bureau.

Ryan applied what he called a "common sense" test by observing that he believes a layman knows the difference between "the city" and "the country." He testified that as he has driven between the Harvard Property and the La Jolla Property, he has never felt himself to be in "the country." Thus, he concludes that the Harvard Property and the La Jolla Property are *in* the same urban area.

Ryan testified that he believes the definition of a Primary Metropolitan Statistical Area promulgated by the Census Bureau is persuasive as to the issue of whether the Harvard Property and the La Jolla Property are in the same urban area. He testified that the Houston, Texas area consists of Harris County and each of the counties, other than Galveston County, which is contiguous to Harris County. He testified that this area includes Montgomery County, Texas, where the La Jolla Property is located. The Harvard Property is located in Harris County.

Bray, who is also an attorney, testified in deposition[4] that he has known Debtor since he and Debtor were in law school

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[4] Bray's deposition was adnitted. in lieu of live testimony, by stipulation of the parties.

together. He testified that he had an office at the Harvard Property during 1993. He testified that he represented Debtor in the Montgomery County suit. He testified that he has represented Shanda Nunu in connection with the filing of applications for writs of habeas corpus and for mandamus, in connection with the La Jolla Property. (POA Exhibit 32).

Bray testified that he believes Conroe and Houston are in the same urban area. He testified that he accepts the statistical designations of the Census Bureau. He testified that he has made the drive between the Harvard Property and the La Jolla Property, and that he believes there to be "contiguous or continuous metropolitan areas between those properties all the way." (POA Exhibit 32).

Bray did testify that be knows of no state or federal court opinion, legislative enactment, or scholarly work in which it was suggested that the Primary Metropolitan Statistical Area designation was used to define the "same urban area" for the purposes of Section 41.002(a) of the Texas Property Code.

The question of whether two parcels of property are in the "same urban area" within the meaning of Section 41.002(a) of the Texas Property Code is an issue of first impression in this jurisdiction. The Fifth Circuit has held that the question of whether a claimed homestead is rural or urban is a question of fact. See Matter of Crowell, 138 F.3d 1031 (5th Cir. 1992), and cases cited therein. This court treats the question of whether two parcels are in the "same urban area" as a question of fact.

The court finds the expert testimony of Henry to be credible, and based on substantial experience and expertise in land, use. By contrast, the non-expert observations of Plaintiffs' longtime acquaintances are not credible. The statistical designations of the Census Bureau have not been used by experts for determining whether two parcels are located in the same urban area, and, the Census Bureau itself has not suggested the use of these designations for such a purpose. The court concludes that the statistical designations of the Census Bureau are not to be given much weight as measures of the "same urban area" within the meaning of Section 41.002(a) of. the Texas Property Code.

The court concludes that the La Jolla Property and the Harvard Property are not in the same urban area.

Plaintiffs' Homestead

Plaintiffs' complaint contends that the La Jolla Property is their homestead and they may therefore seek lien avoidance pursuant to Section 522 of the Bankruptcy Code. The complaint does not address the significant question of whether The homestead status of the Harvard Property defeats the homestead status of the La Jolla Property. In Plaintiffs' trial brief, for the first time they appear to theorize that, even though they continued to reside in the Harvard Property, the La Jolla Property is their residence homestead because they had a trailer on the property from 1989 to 1995. The court finds that the Harvard Property is Plaintiffs' homestead.

A homestead is established by a combination of both overt acts of homestead usage and the intention on the part of the owner to claim the land as a homestead. Matter of Bradley, 960 F.2d, 502 (5th Cir. 1992).

The courts of this state have held in an unbroken line of authorities that there cannot be two places of residence for a family, separate, and in no manner used together, and both subject to homestead exemption, and further that a homestead may not be acquired by intention at some time in the future to use it as a home, accompanied. with preparations to make it suitable as a home. In applying the rule requiring actual occupancy of the premises claimed as a homestead, if the claimant owned another place which he then occupied as a family residence, other than that claimed as a homestead, even though he may have intended at some future time to occupy the latter as a residence, he is thereby prevented from exempting the latter. Tide Water Oil Co. v. Ross, 123 S.W.2d 479 (Tex. Civ. App.-- Galveston 1933) internal citations omitted] . The initial homestead characterization status, once established, is presumed to continue. U. S. v. Blakeman, 997 F.2d 1084 (5th Cir. 1992)

Once established as homestead, the only way for property to lose its homestead character, after it has been dedicated as a homestead, is by death, abandonment or alienation. Bradley, 960

F.2d, at 508, citing Garrard v. Henderson, 209 S.W.2d 225 (Tex. Civ. App.--Dallas 1948, no writ).

To abandon a homestead, the owner of the property must evince a "present, definite and permanent intent to cease use of the property for homestead purposes." Bradley, 960 F.2d, at 509, quoting West Texas State Bank v. Helms, 326 S.W.2d 47, 49 (Tex. Civ. App.--.Eastland 1959, no writ).

No evidence off any such effort was presented. Indeed, Plaintiffs testified at trial that they had lived and continued to live at the Harvard Property since their marriage, and in Mr. Nunu's case, since his purchase of the property in 1982. The homestead. character of the Harvard Property was established first. Plaintiffs' action in moving a trailer to the La Jolla Property did not evince a "present, definite and permanent intent" to cease use of the Harvard Property as a home.

Plaintiffs' usage of the La Jolla Property was the subject of considerable testimony. Debtor was not credible in his claim of living there, other than for weekends and/or fishing trips.

Charlotte Sherry Schmitt, a resident of Del Lago Estates who lives eleven lots from the La Jolla Property, testified credibly that she drove past and walked past the La Jolla Property several days a week during 1989 and 1990. She testified that she saw no activity on the property other than on the weekend. She testified that she occasionally saw people visiting the property for recreational purposes.

Herb Hilton, a resident of Del Lago Estates who lives 14 lots from the La Jolla Property, testified credibly that he has lived in the subdivision since 1990. He testified that he walks past the neighborhood every day. He testified that he never noticed anyone living in the La Jolla Property. He testified that Plaintiffs were never at the property for more than a day or two at a time.

The testimony of Hilton and Schmitt is credible as to the scope of Plaintiffs' usage of the property, and is consistent with the testimony of Ryan that he and Debtor used the property for weekend fishing visits.

Lien Extent and Validity

An allowed claim is a secured claim to the extent of the value of the creditor's interest in the bankruptcy estate's interest in such property. 11 U.S.C. § 506(a).

The extent of the creditor's interest is defined by state law. Nobelman v. American Say. Bank, 508 U.S. 324, 113 3. Ct. 2106 (1993), citing Butner v. United States, 440 U.S. 48, 99 S. Ct. 914, 59 L.Ed.2d 136 (1979).

Under Texas law, a property owners' association may, "if notice and. an opportunity to be heard are given, collect reimbursement of actual attorney's fees and other reasonable costs incurred by the property owners' association relating to violations of the subdivision' s restrictions or the property owners' association' e bylaws and rules." Tex. Prop. Code. 204.010 (a) (11). A. property owners' association may also "charge costs to an owner's assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments." Tex. Prop. Code. S 204.010(a)(12).

A lien for assessments and attorney's fees is a covenant which runs with the land when it touches and concerns the land; relates to a thing in existence or specifically binds the parties and their assigns; is intended by the original parties to run with the land; and when the successor to the burden has notice. Inwood North Homeowners' Ass'n Inc. v. Harris, 736 S.W.2d 632 (Tex. 1987)

A covenant to pay maintenance assessments for the purpose of repairing and improving the common areas and recreational facilities of a subdivision touches and concerns the land. Harris, 736 S.W.2d, at 635.

Both the 1982 and the 1988 Restrictions provide that assessments and attorney's fees are secured by a lien in the property. Both the 1982 and the 1988 Restrictions provide that the property and all future owners of the property are bound by the restrictions. (POA Exhibits 2, 5).

Plaintiffs contend that the POA's lien is invalid because the Debtor acquired his interest in the La Jolla Property prior to the incorporation date of the POA. Plaintiffs contend that the 1982 Restrictions do not apply, because the benefit of the 1382 Restriction did. not inure to the POA until it was incorporated.

The POA contends that the state court judgment is res judicata as to the question of lien validity.

The state court judgment is not res judicata as to the question of lien validity. However, the rules of issue preclusion apply to foreclose Debtor's assertion that the property is not burdened by the 1988 Restrictions.

Issue preclusion applies when (1) the issue at stake is identical to the one involved in prior action; (2) the issue was actually litigated in the prior action; and (3) determination of the issue in the prior action was a part of the judgment in that earlier action. Matter of Southmark Corp., 163 F.3d 925 (5th Cir. 1999)

In the Montgomery County suit, the issue of whether the property was burdened with the 198.8 Restrictions was actually litigated. The court's final judgment, which incorporates its earlier summary judgment by reference, determines that the property is burdened by the 1988 Restrictions.

The judgment of the state court reflects an award for assessment owing pursuant to the 198& Restrictions, civil damages pursuant to. Section 202.004 of the Texas- Property Code, and attorney's fees.

With respect to the award for assessments, the assessments are secured by the land pursuant to the terms of the 1988 Restrictions.

With respect to the award of attorney's fees and civil damages, Plaintiffs cite Boudreaux Civic Assn v. Cox, 882 S.W.2d 543 (Tex. App. --Houston [lst Dist.] 1994) for the proposition that an award of attorney fees under the Texas Property Code is not secured by a lien. In Cox, the deed restrictions permitted an award of attorney's fees only if there was an award of monetary

damages. There was no award of monetary damages, and thus the award of attorney's fees in that case could only have been pursuant to statute, and not pursuant to the deed restrictions.

In the instant case, the judgment for attorney's fees was awarded pursuant to the provisions of the 1988 Restrictions for a lien securing, *inter alia*, payment of attorney's fees incurred, in collection of assessments. The court concludes that the attorney' s fees are secured by the land pursuant to the terms of the 1988 Restrictions.

With respect to the civil damages awarded pursuant to Section 202.004 of the Texas Property Code, there is no provision in statute, the 1982 Restrictions, or the 1988 Restrictions, for imposition of a prior lien upon the property to secure its payment.[5] Absent such provision, the rule of Boudreaux Civic Ass'n v. Cox, 882 S.W.2d 543 (Tex. App. --Houston [1st Dist.] 1994) controls. The court concludes that the civil damages awarded pursuant to Section 202.004 of the Texas Property Code are not secured by the La Jolla Property.

Claim Allowance

Section 502(b) of the Bankruptcy Code provides for the determination of claims by the court.[6] Debtor asserts that the claim of the POA is not allowable because a clause entered in the contempt proceeding denied all relief to the POA not granted.

The same argument was asserted by Debtor in the state court, and was rejected. (POA Exhibits 42, 19) . The state court's determination is res judicata of the issue raised by Debtor.

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[5] The court notes, however, that because the La Jolla Property is not Debtor' a homestead, the POA could conceivably abstract the judgment, and thereby create a lien pursuant to Section 52.301 of the Texas Property Code.

[6] To the extent the judgment of the state court may be considered, contingent as the result of Debtor' s filing of a motion for new trial, the court estimates the POA' s claim pursuant to Section 502(c) of the Bankruptcy Code to be the amounts contained in the Final Judgment (POA Exhibit 19).

Shanda Nunu

Shanda Nunu asserts a homestead right in the La Jolla Property. She contends that she owns an interest in the property which. could not be conveyed to the POA absent her consent, citing Section 5.001 of the Texas Family Code.[7]

Section 5.001 of the Texas Family Code provides:

> Whether the homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber it without the joinder of the other spouse except as provided in this subchapter or by other rules of law.

Tex. Fam. Code § 5.001.

However, since the La Jolla Property is not Debtor's homestead, Shanda Nunu is not afforded the right to require joinder in any conveyance of the property. Hanes v. Hanes, 239 S.W. 190 (Tex. Comm'n App. 1922, judgm't adopted). Moreover, the creation of the restrictive covenants, which run with the land, preceded Shanda Nunu's marriage to Debtor. The court concludes that Shanda Nunu has no right with respect to the La Jolla Property arising from Section 5.001 of the Texas Family Code.

Based on the foregoing, a separate conforming Judgment will be entered.

Signed at Houston, Texas on this 31 day of March, 2000.

/s/ Letitia Z. Clark

United States Bankruptcy Judge

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[7] Plaintiffs' citation is to Section "5.81." No such section exists.

APPENDIX 7

STATE OF TEXAS §
§ KNOW ALL MEN BY
§ THESE PRESENTS:
COUNTY OF MONTGOMERY §

DESIGNATION OF HOMESTEAD

BEFORE ME, the undersigned Notary Public, on this day personally appeared PAUL E. NUNU who under oath deposes and says the following:

"My name is Paul E. Nunu. I am a single adult person not otherwise entitled to a homestead, am the original owner, and reside at the following described real property at varying times during the year:

> All of Lot THIRTY-FIVE (35) and a portion of Lot THIRTY-SIX (36) in Del Lago Estates, a subdivision in Montgomery County, Texas, said property "containing approximately 27,000 square feet of land and being more commonly known as 35 La Jolla Circle, Montgomery, Texas.
>
> The above is true and correct."
>
> /s/ Paul E. Nunu

STATE OF TEXAS §
§ FILED JULY 14, 1988
COUNTY OF MONTGOMERY §

BEFORE ME, the undersigned authority, on this day personally appeared appeared Paul E. Nunu, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal this 10th day of July, 1988.

s/ Notary Public in and for

No. 89-02-01216-CV

DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION,	)	IN THE DISTRICT COURT OF
VS.	)	MONTGOMERY COUNTY, TEXAS
PAUL E. NUNU,	)	284TH JUDICIAL DISTRICT

SUMMARY JUDGMENT

BE IT REMEMBERED THAT on the 22nd day of August, 1990, came on to be heard the Motion for Summary Judgment filed in this case by the Defendant, PAUL E. NUNU (hereinafter referred to an "NUNU"). It should further be remembered that on July 14, 1989 this Court heard the Motion for Summary Judgment filed in this cause by the Plaintiff DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION (hereinafter referred to as "ASSOCIATION"). The ASSOCIATION objected to NUNU's use of the authenticated but uncertified copies in NUNU's Motion for Summary Judgment and in NUNU's Response to the ASSOCIATION's Motion for Summary Judgment and the Court, after hearing the arguments of counsel, overruled the objections. During the hearing on NUNU's Motion for Summary Judgment, NUNU objected under Rule 215 to the undesignated expert testimony and lay opinions contained in the ASSOCIATION'S Response to NUNU's Motion for Summary Judgment, and the Court after hearing the arguments of counsel, denied both Motions for Summary Judgment on November 16, 1989. Thereafter Defendant NUNU filed his First Motion to Enter an Appealable Judgment which this Court took under advisement. Thereafter NUNU filed his Motion for Rehearing of Plaintiff's and Defendant's Motions for Summary Judgment and Motion to Enter an Appealable Order and to Stay Proceedings Pending Appeal. The Court, after reviewing the Motion and hearing the arguments of counsel is on the opinion that said Motion should be granted. the Court thereafter reconsidered all proper Summary Judgment evidence and renders Summary Judgment in favor of Plaintiff ASSOCIATION as follows.

The Court finds that the real property described as Lots 35 and a portion of Lot 36 of Del Lago Estates owned by Defendant NUNU is burdened with the subject 1988 restrictive covenants and accordingly it is

ORDERED that the Defendant PAUL E. NUNU comply with all the terms, covenants and conditions of the 1988 Restrictive Covenants described in instrument entitled First Amended and Restated Declaration of Covenants, Conditions, Assessments, Charges, Servitudes, Liens, Reservations, and Easements for Del Lago Estates recorded in the real property records of Montgomery County, Texas, under Clerk No. 83-01804.

The Court finds that substantial legal rights of the litigants are threatened and substantial time and expense can be saved by this Court granting Defendant's Motion to Enter an Appealable Order.

The Court finds that a good and sufficient supersedeas bond, to be filed by Defendant PAUL E. NUNU, shall be $100.00. Upon the filing of this bond with the Clerk of the Court, the provisions ordering injunctive relief in this cause shall be suspended pending an appeal of this judgment.

The. Court ORDERS that all other discovery and. proceedings in this cause. shall be. stayed. upon the. posting of the bonds herein described until this matter has been reviewed. by the appropriate appellate courts.

SIGNED this 23 day of July, 1990

/s/ Olen Underwood

JUDGE PRESIDING

NO. 89-03-01216-CY

DEL. LAGO ESTATES PROPERTY OWNERS ASSOCIATION	§	IN THE DISTRICT COURT
VS.	§	MONTGOMERY COUNTY, TEXAS
PAUL E. NUNU	§	284th JUDICIAL DISTRICT

ORDER OF CONTEMPT

Came on for hearing on the tenth (10th) day of July, 1995, Plaintiff Del Lago Estates Property Owners Association's (the "Associations) Motion To Show Cause Why Defendant Paul E. Nunu. ("Nunu") Should Not Be Held In Contempt of Court, Or In The Alternative, Motion To Enforce the Judgment. Plaintiff Association appeared by and through its President, Herb Hilton, and its counsel, Boris A. Hidalgo. Defendant Nunu appeared in person and with his counsel, I. Marcus Hill.

After reviewing the pleadings, evidence and arguments presented by both parties, the Court finds:

(a) that the Judgment entered July 22, 1990, by this Court in the above captioned cause (the "Judgment") is final and enforceable pursuant to the Mandate dated December 29, 1992, issued by the Court of Appeals, Ninth District of Texas at Beaumont, in Case No. 09-90-201 CV (the "Appeal");

(b) that. Defendant Nunu. is in contempt for violating the Judgment and Sections 5.02, 6.01.2 and. 6..01.27 of the First Amended and Restated Declaration of Covenants, Conditions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for Del Lago Estates (the "Deed Restrictions") by erecting fences and other improvements including a. boat house and. a. bath house or outbuilding upon Lot 35 (the "Property") of Del Lago Estates in Montgomery County, Texas without first obtaining architectural approval from the Association, and by permanently storing upon the Property a fifth wheel trailer, an Air Stream travel. trailer, and a. recreational vehicle which: are not in day-to-day use off the premises, and by placing a trailer/mobile home upon the Property for use as a residential dwelling by Nunu and his spouse, a non-party; and,

(c) that Defendant Nunu's defenses, including but not limited to all claims of homestead, indispensable parties, statute of limitations, lack of jurisdiction over Nunu's spouse, and defects under Rule 633 of the Texas Rules of Civil Procedure do not affect the finality or enforceability of the Judgment and do not constitute legal excuse or justification for violation thereof.

It is therefore, ORDERED that the Judgment is in all respects final and enforceable. It is further, ORDERED that Defendant Nunu is in contempt of court for violating the Judgment. It is further, ORDERED that not later than the sixtieth (60th) day from the entry of this Order, Defendant Nunu shall remove from the Property the trailer/mobile home, the fifth wheel trailer, the Air Stream travel trailer, and the recreational vehicle. It is further,

ORDERED that not later than the sixtieth (60th) day from the entry of this Order, Defendant Nunu shall make written application to the Association for architectural approval of any and all fencing, structures and other improvements currently on the Property which Nunu would like to retain. It is further,

ORDERED that architectural approval for any application filed by Defendant Nunu under this Order shall not be unreasonably withheld by the Plaintiff Association. It is further;

ORDERED that should Defendant Nunu fail to fully and timely comply with the terms of this Order, Nunu shall be incarcerated until such time as he fully complies. It is further.

ORDERED that Defendant Nunu. shall be purged of this Order of Contempt if he fully and timely complies with all terms contained herein. It is further,

ORDERED that. all other relief requested by either party in the show cause hearing and not expressly granted herein is hereby denied.

Signed this 14th day of August, 1995

/s/ Olen Underwood

STATE DISTRICT JUDGE OLEN UNDERWOOD

No. 89-03-012150CV

DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION	§	IN THE DISTRICT COURT
VS.	§	MONTGOMERY COUNTY, TEXAS
PAUL E. NUNU	§	284TH DISTRICT COURT

ORDER FOR COMMITMENT

Came on for consideration on this date the Motion of the Del Lago Estates Property Owners Association (the "Association") for Commitment of Defendant Paul E. Nunu ("Nunu").

After reviewing the evidence, the Court finds that: (a) in a two day hearing on July 10 and 11, 1995, attended by Nunu and his counsel, this Court found Nunu guilty of violating the final Judgment entered on July 23, 1990, in the above captioned cause; (b) by its Order of contempt entered on August 14, 1995, in the above entitled cause, this Court required that within 60 days of the entry of such Order, Nunu remove from his property within Del Lago Estates (the "property"), the trailer/mobile home, the fifth wheel trailer, the Air Stream travel trailer, and the recreational vehicle.

The Court finds that Nunu has failed to purge himself of the Order of Contempt by failing to remove the trailer/mobile home from the Property. It is therefore,

ORDERED, ADJUDGED, AND DECREED that, as punishment for such contempt, Paul E. Nunu be and is hereby ordered placed in the county jail of Montgomery County, Texas, until he purges himself of this contempt by removing the trailer/mobile home from the Property. It is further,

ORDERED ADJUDGED, AND DECREED that a capias be issued commanding the Sheriff of Montgomery County, Texas, to arrest Paul E. Nunu and place him in the county jail in Montgomery County, Texas, and to there safely keep him until

he has purged himself of contempt by removing the trailer/mobile home from the Property, at which time the Sheriff shall release him from custody. It is further,

ORDERED, ADJUDGED, AND DECREED that the capias shall recite generally the proceedings in this case, and that it shall be accompanied by a certified copy of this Order to be served upon Paul E. Nunu as further evidence of the Sheriff's authority. It is further,

ORDERED, ADJUDGED, AND DECREED that the costs of this proceeding shall be and are assessed against Paul E. Nunu for which execution may issue.

Signed this 30 day of October 1995.

/s/ Olen Underwood

STATE DISTRICT JUDGE OLEN UNDERWOOD

Executed at 11:40 A.M. in open court with all counsel present.

NO. 89-03.01216-CY

DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION	§	IN THE DISTRICT COURT
vVS.	§	MONTGOMERY COUNTY, TEXAS
PAUL E. NUNU	§	284TH JUDICIAL DISTRICT

ORDER

Came on for consideration on this date the Motion of the Del Lago Estates Property Owners Association ("the Association") for Commitment of Defendant Paul E. Nunu. ("Nunu").

After receiving the evidence, the Court finds that: (a) in a two day hearing on July 10 and 11, 1995, attended by Nunu and his counsel, this Court found Nunu guilty of violating the final Judgment entered on July 22, 1990, in the above captioned cause; (b) by its Order of Contempt entered on August 14, 1995, in the above entitled cause, this Court required that within 60 days of the entry of such Order, Nunu remove from his property within Del Lago Estates (the "Property"), the trailer/mobile home, the five wheel trailer, the Air Stream travel trailer, and the recreational vehicle; (c) the Order of Contempt also required that within 60 days of the entry of the Order, Nunu make written application to the Association for architectural approval of any and all fencing, structures and other improvements currently on the Property which Nunu would like to retain; (d) the Order of Contempt also required, the Association not to unreasonably withhold, architectural approval for any application filed by Nunu; (e) the Association received an application from Nunu which sought approval for- "all improvements;" (f) the Association thereafter approved. certain improvements and. denied approval on an Out House/Bath House, a Wood. Privacy Fence. Above-Ground. Utility Connection and. Structures Adjacent to or Attached. to the Mobile Home (the "unapproved. improvements") and. requested their immediate removal.

The Court finds that Nunu has failed to purge himself of the Order of Contempt by refusing to remove the trailer/mobile home from the Property and by refusing to remove the unapproved improvements from the Property. It is therefore,

ORDERED, ADJUDGED, AND DECREED that Paul E. Nunu be and is hereby ordered placed in the county jail of Montgomery County, Texas, until he purges himself of this contempt by removing the trailer/mobile home from the Property and by removing the unapproved improvements from the Property. It is further,

ORDERED, ADJUDGED AND DECREED that a capias be issued commanding the Sheriff of Montgomery County, Texas, to arrest Paul E. Nunu and place him in the county jail in Montgomery County, Texas, and to there safely keep him until he has purged himself of contempt by removing the trailer/mobile home from the Property and by removing the unapproved improvements from the Property, at which time the Sheriff shall release him from custody. It is further,

ORDERED, ADJUDGED AND DECREED that the capias shall recite generally the proceedings in this case, and that it shall be accompanied by a certified copy of this Order to be served upon Paul E. Nunu as further evidence of the Sheriff's authority. It is further,

ORDERED, ADJUDGED, AND DECREED that should Paul E. Nunu fail to remove the trailer/mobile home and the unapproved improvements within 14 days of the signing of this Order, the Association may enter the Property, remove those items, and. assess all necessary and reasonable costs incurred, against Paul E. Nunu for which a. lien shall be imposed on the Property pursuant to. the "First Amended And Restated Declaration of Covenants, Liens, Reservations and Easements for Del Lago Estates", which lien the Association may immediately foreclose. It is further,

ORDERED, ADJUDGED AND DECREED that the Association shall provide Notice to Paul E. Nunu of the repository of all items removed from the Property. It is further, -

ORDERED, ADJUDGED AND DECREED that in the event that Paul E. Nunu fails to immediately claim the removed items, the storage facility storing such items shall be entitled to assess a reasonable and necessary fee for storage of the items; such fee shall be a lien upon the items, and the storage facility shall be entitled to foreclose upon such lien under applicable law. It is further,

ORDERED, ADJUDGED, AND DECREED that the costs of this proceeding shall be and are assessed against Paul E. Nunu for which execution may issue.

ORDERED, ADJUDGED AND DECREED that Mr. Nunu shall be released from jail upon reimbursement of all reasonable and necessary expenses incurred by the Association in the removal of items from the Property as authorized herein.

Signed this 30 day of October, 1995.

/s/ Olen Underwood

JUDGE OLEN UNDERWOOD

Signed 3:04 pm 10/30/95

Executed in open court with all attorneys present.

NO. 89-03-01215-CV

DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	MONTGOMERY COUNTY, TEXAS
PAUL E. NUNU	§	284TH JUDICIAL DISTRICT

ORDER DISCHARGING CONTEMPT

On the 7th day of January 1998, the Court heard Del Lago Estates Property Owners Associations Motion to Enforce the Order of Contempt of August 14, 1995, as affirmed by the Texas Supreme Court and the Response and Motion to Reconsider filed *by* Defendant Paul E. Nunu ("Nunu") At the conclusion of the presentation of evidence, the Court denied Nunu's Motion to Reconsider and ordered Nunu incarcerated until he fully complied with the Order of Contempt and the Writ of Commitment. Nunu was subsequently released on personal recognizance on January 8, 1998, on the condition that he immediately comply with the Court's orders. The Court finds that Nunu has fully complied and removed all unapproved improvements from the property. It is, therefore,

ORDERED that Nunu is fully discharged from the Order of Contempt of August 14, 1995, and. the two Writs of Commitment of October 30, 1995, issued by this Court and the personal recognizance bond dated January 8, 1998.

SIGNED this 10 day of March, 198

/s/,Olen Underwood

HONORABLE OLEN UNDERWOOD.

CAUSE NO. 90-10-03568-CV

DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	MONTGOMERY COUNTY, TEXAS
PAUL E. NUNU	§	284TH JUDICIAL DISTRICT

FINAL JUDGMENT

CAME ON FOR CONSIDERATION on the 1st day of FEBRUARY, 1999, the trial of the above captioned cause. Plaintiff DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION (the "Association") appeared by and through its designated representative, Jerry Ronquille, and its attorneys of record, Boris A. Hidalgo, Jon L. Tankersley, and the law firm of Brown Parker & Leahy, LLP. Defendant PAUL B. NUNU ("NUNU") appeared in person, and by and through his attorneys of record, John Davis, Marc Hill, and Steve Schmoot. All parties announced ready for trial The parties submitted certain matters in controversy, legal and factual, to the jury, and certain matters in controversy, legal and factual, to the Court. The Court impaneled and swore the jury which, along with the Court, heard the evidence and arguments of counsel. The Court submitted questions, definitions, and instructions to the jury. In response, the jury made findings that the court received, filed and entered of record. The questions submitted to the jury and the jury's findings are attached as Exhibit "A" and incorporated by reference. Plaintiff Association moved for judgment on the verdict and on the Court's determination as to the amount of reasonable and necessary attorney's fees to award the Association pursuant to Section 5.06 of the Texas Property Code and Section 37.009 of the Texas Civil Practice and Remedies Code. The Court considered the motion for entry of judgment, the Consent Judgment entered on July 23, 1990, in Cause No. 89-03-01216-CV as affirmed by the 9th District Court of Appeals (Case No. 09-90-201 CV) and the Texas Supreme Court (Case No. D-2624) declaring NUNU's property in Del Lago Estates subject to the "First Amended and Restated Declaration of Covenants, Conditions, Assessments, Charges, Servitudes,

Liens, Reservations and Easements for Del Lago Estates" (the "Restrictive Covenants") recorded in the real property records of Montgomery County, Texas, under Clerk No. 8801804, and enjoining NUNU to fully comply therewith, and renders judgment for Plaintiff Association as follows:

ORDERED, ADJUDGED, & DECREED that the Summary Judgment entered in Cause No. 90-10-03 568-CV on the 21st day of September, 1998, adjudging NUNU liable for assessments, civil damages and attorney's fees is annexed hereto as Exhibit "B,' incorporated herein, and hereby made final as incorporated for all purposes. It is further,

ORDERED, ADJUDGED, & DECREED that Plaintiff ASSOCIATION recover from Defendant NUNU the amount of THIRTEEN THOUSAND, EIGHT HUNDRED FIFTY & NO/100 DOLLARS ($13,850.00) for all assessments owing by NUNU to the ASSOCIATION pursuant to Section 4.04 of the Restrictive Covenants from May 6,1987, through February 2, 1999. It is further,

ORDERED, ADJUDGED, & DECREED that Plaintiff ASSOCIATION recover from Defendant NUNU the amount of SEVENTY EIGHT THOUSAND & NO/100 DOLLARS ($78,000.00) in civil damages pursuant to Section 202.004 of the Texas Property Code. It is further,

ORDERED, ADJUDGED, & DECREED that Plaintiff ASSOCIATION recover from Defendant NUNU the amount of TWO HUNDRED SEVENTY SIX THOUSAND, ONE HUNDRED TWO & 59/100 DOLLARS ($276,102.59) as reasonable and necessary attorney's fees. It is further,

ORDERED, ADJUDGED, & DECREED that Plaintiff ASSOCIATION recover from Defendant NUNU the amount of TEN THOUSAND & NO/100 DOLLARS ($10,000.00) as reasonable and necessary attorney's fees in the event an appeal is made to the Texas Court of Appeals but is unsuccessful. It is further,

ORDERED, ADJUDGED, & DECREED that Plaintiff ASSOCIATION recover from Defendant NUNU the amount of

TEN THOUSAND & NO/100 DOLLARS ($10,000.00) as reasonable and necessary attorney's fees in the event an appeal is made to the Texas Supreme Court but is unsuccessful It is further,

ORDERED, ADJUDGED, & DECREED that Plaintiff ASSOCIATION recover from Defendant NUNU post-judgment interest at the rate of TEN PERCENT (10%) per annum on the entire amount of this Judgment from the date of judgment until paid. It is further,

ORDERED, ADJUDGED, & DECREED that Plaintiff ASSOCIATION recover from Defendant NUNU all costs of court. It is further,

ORDERED, ADJUDGED, & DECREED that execution issue for this Judgment It is further,

ORDERED, ADJUDGED, & DECREED that all relief not expressly granted herein is hereby denied.

SIGNED on September 30, 1999.

s/ Olen Underwood

STATE DISTRICT JUDGE PRESIDING

APPENDIX 8

UNITED STATES CODE
TITLE 11. BANKRUPTCY

CHAPTER 1. GENERAL PROVISIONS

§§ 101. Definitions.

In this title -

(36) "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

UNITED STATES CODE

TITLE 11. BANKRUPTCY

CHAPTER 3. CASE ADMINISTRATION

§§ 362. Automatic stay.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if -

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

UNITED STATES CODE
TITLE 11. BANKRUPTCY

CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE

§§ 522. Exemptions.

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -

(A) a judicial lien, other than a judicial lien that secures a debt -

(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

(ii) to the extent that such debt -

(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.; [*sic*]

(B) a nonpossessory, nonpurchase-money security interest in any -

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of -

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor -

(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property; the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds $5,000.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII--APPEALS TO DISTRICT COURT OR BANKRUPTCY APPELLATE PANEL

Rule 8002. Time for Filing Notice of Appeal.

(a) Ten-day period.

The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment , order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the

date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

(b) Effect of motion on time for appeal.

If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion:

(1) to amend or make additional findings of fact under Rule 7052 , whether or not granting the motion would alter the judgment ;

(2) to alter or amend the judgment under Rule 9023 ;

(3) for a new trial under Rule 9023; or

(4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment , order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001 , to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(c) Extension of time for appeal.

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party, unless the judgment , order, or decree appealed from:

(A) grants relief from an automatic stay under §§ 362, §§ 922, §§ 1201, or §§ 1301;

(B) authorizes the sale or lease of property or the use of cash collateral under §§ 363;

(C) authorizes the obtaining of credit under §§ 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under §§ 365;

(E) approves a disclosure statement under §§ 1125; or

(F) confirms a plan under §§ 943, §§ 1129, §§ 1225, or §§ 1325 of the Code .

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART IX--GENERAL PROVISIONS

Rule 9021. Entry of Judgment.

Except as otherwise provided herein, Rule 58 F.R.Civ.P. applies in cases under the Code . Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003 . The reference in Rule 58 F.R.Civ.P. to Rule 79(a) F.R.Civ.P. shall be read as a reference to Rule 5003 of these rules.

AMENDMENT V (1701)

Right of Accused Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.